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COMMENTARIES

ON THE

Laws of England.

BOOK THE FOURTH.

BY

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ONE OF THE JUSTICES OF HIS MAJESTY'S COURT OF COMMON PLEAS.

THE FOURTEENTH EDITION,

WITH THE LAST CORRECTIONS OF THE AUTHOR;

AND WITH NOTES AND ADDITIONS

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COMMENTARIES

CONSULTS,

Laws of England.

CONTENTS.

BOOK IV.

Of PUBLIC WRONGS.

CHAP. I.

Of the NATURE *of* CRIMES; *and their* PUNISHMENT. Page 1

CHAP. II.

Of the PERSONS CAPABLE *of committing* CRIMES. 20

CHAP. III.

Of PRINCIPALS *and* ACCESSORIES. 34

CHAP. IV.

Of OFFENCES *againſt* GOD *and* RELIGION. 41

CHAP. V.

Of OFFENCES *againſt the* LAW *of* NATIONS. 66

CHAP. VI.

Of HIGH TREASON. Page 74

CHAP. VII.

Of FELONIES *injurious to the* KING'S PREROGATIVE. 94

CHAP. VIII.

Of PRAEMUNIRE. 103

CHAP. IX.

Of MISPRISIONS *and* CONTEMPTS *affecting the* KING *and* GOVERNMENT. 119

CHAP. X.

Of OFFENCES *againſt* PUBLIC JUSTICE. 127

CHAP. XI.

Of OFFENCES *againſt the* PUBLIC PEACE. 142

CHAP. XII.

Of OFFENCES *againſt* PUBLIC TRADE. 154

CHAP. XIII.

Of OFFENCES *againſt the* PUBLIC HEALTH, *and the* PUBLIC POLICE *or* OECONOMY. 161

CHAP. XIV.

Of HOMICIDE. Page 176

CHAP. XV.

Of OFFENCES *againſt the* PERSONS *of* INDIVIDUALS. 205

CHAP. XVI.

Of OFFENCES *againſt the* HABITATIONS *of* INDIVIDUALS. 220

CHAP. XVII.

Of OFFENCES *againſt* PRIVATE PROPERTY. 229

CHAP. XVIII.

Of the means of PREVENTING *offences.* 251

CHAP. XIX.

Of COURTS *of a* CRIMINAL JURISDICTION. 258

CHAP. XX.

Of SUMMARY CONVICTIONS. 280

CHAP. XXI.

Of ARRESTS. 289

CHAP. XXII.

Of COMMITMENT, *and* BAIL. Page 296

CHAP. XXIII.

Of the several MODES *of* PROSECUTION. 301

CHAP. XXIV.

Of PROCESS *upon an* INDICTMENT. 318

CHAP. XXV.

Of ARRAIGNMENT, *and it's* INCIDENTS. 322

CHAP. XXVI.

Of PLEA, *and* ISSUE. 332

CHAP. XXVII.

Of TRIAL *and* CONVICTION. 342

CHAP. XXVIII.

Of the BENEFIT *of* CLERGY. 365

CHAP. XXIX.

Of JUDGMENT, *and it's* CONSEQUENCES. 375

CHAP. XXX.

Of REVERSAL *of* JUDGMENT. 390

CHAP. XXXI.

Of REPRIEVE *and* PARDON. Page 394

CHAP. XXXII.

Of EXECUTION. 403

CHAP. XXXIII.

Of the RISE, PROGRESS, *and gradual* IMPROVEMENTS *of the* LAWS *of* ENGLAND. 407

APPENDIX.

§ 1. RECORD *of an Indictment and Conviction of* MURDER, *at the assises.* Page i

§ 2. *Conviction of* Manslaughter. iv

§ 3. *Entry of a Trial* instanter *in the Court of King's Bench, upon a collateral Issue; and Rule of Court for Execution thereon.* v

§ 4. *Warrant of Execution on Judgment of Death, at the general Gaol-delivery in* London *and* Middlesex. vi

§ 5. *Writ of Execution upon a Judgment of* Murder *before the* King *in* Parliament. vii

INDEX.

CHAP. PAGE

V. Religion and Theology. 134

CHAP. PAGE

VI. [illegible] 161

CHAP. PAGE

VII. [illegible] 187

APPENDIX.

COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE FOURTH.

OF PUBLIC WRONGS.

CHAPTER THE FIRST.

OF THE NATURE OF CRIMES; AND THEIR PUNISHMENT.

WE are now arrived at the fourth and laſt branch of theſe commentaries; which treats of *public wrongs*, or *crimes* and *miſdemeſnors*. For we may remember that, in the beginning of the preceding volume [a], wrongs were divided into two ſpecies: the one *private*, and the other *public*. Private wrongs, which are frequently termed civil injuries, were the ſubject of that entire book: we are now therefore, laſtly, to proceed to the conſideration of public wrongs, or crimes and miſdemeſnors; with the means of their prevention and puniſhment. In the purſuit of which ſubject I ſhall conſider, in the firſt place, the general nature of crimes and puniſhments; ſecondly, the perſons capable of committing crimes;

[a] Book III. ch. 1.

thirdly, their ſeveral degrees of guilt, as principles or acceſſaries; fourthly, the ſeveral ſpecies of crimes, with the puniſhment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and ſixthly, the method of inflicting thoſe puniſhments, which the law has annexed to each ſeveral crime and miſdemeſnor.

FIRST, as to the general nature of crimes and their puniſhment; the diſcuſſion and admeaſurement of which forms in every country the code of criminal law; or, as it is more uſually denominated with us in England, the doctrine of the *pleas of the crown*; ſo called, becauſe the king, in whom centers the majeſty of the whole community, is ſuppoſed by the law to be the perſon injured by every infraction of the public rights belonging to that community, and is therefore in all caſes the proper proſecutor for every public offence [b].

THE knowlege of this branch of juriſprudence, which teaches the nature, extent, and degrees of every crime, and adjuſts to it it's adequate and neceſſary penalty, is of the utmoſt importance to every individual in the ſtate. For (as a very great maſter of the crown law [c] has obſerved upon a ſimilar occaſion) no rank or elevation in life, no uprightneſs of heart, no prudence or circumſpection of conduct, ſhould tempt a man to conclude, that he may not at ſome time or other be deeply intereſted in theſe reſearches. The infirmities of the beſt among us, the vices, and ungovernable paſſions of others, the inſtability of all human affairs, and the numberleſs unforeſeen events, which the compaſs of a day may bring forth, will teach us (upon a moment's reflection) that to know with preciſion what the laws of our country have forbidden, and the deplorable conſequences to which a wilful diſobedience may expoſe us, is a matter of univerſal concern.

IN proportion to the importance of the criminal law, ought alſo to be the care and attention of the legiſlature in properly

[b] See Vol. I, p. 268.

[c] Sir Michael Foſter, pref. to rep.

forming

forming and enforcing it. It ſhould be founded upon principles that are permanent uniform, and univerſal; and always conformable to the dictates of truth and juſtice, the feelings of humanity, and the indelible rights of mankind: though it ſometimes (provided there be no tranſgreſſion of theſe external boundaries) may be modified, narrowed, or enlarged, according to the local or occaſional neceſſities of the ſtate which it is meant to govern. And yet, either from a want of attention to theſe principles in the firſt concoction of the laws, and adopting in their ſtead the impetuous dictates of avarice, ambition, and revenge; from retaining the diſcordant political regulations, which ſucceſſive conquerors or factions have eſtabliſhed, in the various revolutions of government; from giving a laſting efficacy to ſanctions that were intended to be temporary, and made (as lord Bacon expreſſes it) merely upon the ſpur of the occaſion; or from, laſtly, too haſtily employing ſuch means as are greatly diſproportionate to their end, in order to check the progreſs of ſome very prevalent offence; from ſome, or from all, of theſe cauſes, it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I ſhall not here enter into any minute inquiries concerning the local conſtitutions of other nations; the inhumanity and miſtaken policy of which have been ſufficiently pointed out by ingenious writers of their own [d]. But even with us in England, where our crown law is with juſtice ſuppoſed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties leſs uncertain and arbitrary; where all our accuſations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by ſuch of his equals, againſt whom he can form no exception nor even a perſonal diſlike; —even here we ſhall occaſionally find room to remark ſome particulars that ſeem to want reviſion and amendment. Theſe have chiefly ariſen from too ſcrupulous an adherence to ſome rules of the antient common law, when the reaſons have ceaſed upon which thoſe rules were founded; from not

[d] Baron Monteſquieu, marquis Beccaria, &c.

repealing ſuch of the old penal laws as are either obſolete or abſurd; and from too little care and attention in framing and paſſing new ones. The enacting of penalties, to which a whole nation ſhall be ſubject, ought not to be left as a matter of indifference to the paſſions or intereſts of a few, who upon temporary motives may prefer or ſupport ſuch a bill; but be calmly and maturely conſidered by perſons who know what proviſions the laws have already made to remedy the miſchief complained of, who can from experience foreſee the probable conſequences of thoſe which are now propoſed, and who will judge without paſſion or prejudice how adequate they are to the evil. It is never uſual in the houſe of peers even to read a private bill, which may affect the property of an individual, without firſt referring it to ſome of the learned judges, and hearing their report thereon [c]. And ſurely equal precaution is neceſſary, when laws are to be eſtabliſhed, which may affect the property, the liberty, and perhaps even the lives, of thouſands. Had ſuch a reference taken place, it is impoſſible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciouſly) the mound of a fiſhpond, whereby any fiſh ſhall eſcape; or to cut down a cherry-tree in an orchard [f]. Were even a committee appointed but once in an hundred years to reviſe the criminal law, it could not have continued to this hour a felony without benefit of clergy, to be ſeen for one month in the company of perſons who call themſelves, or are called Egyptians [g] (1).

IT is true, that theſe outrageous penalties, being ſeldom or never inflicted, are hardly known to be law by the public:
[5] but that rather aggravates the miſchief, by laying a ſnare for the unwary. Yet they cannot but occur to the obſervation of any one, who hath undertaken the taſk of examining the

[c] See Vol. II. p. 345.
[f] Stat. 9 Geo. I. c. 22. 31 Geo. II. c. 42.
[g] Stat. 5 Eliz. c. 20.

(1) The 5 Eliz. c. 20. which introduced this crime and its ſevere puniſhment, is repealed by the 23 Geo. III. c. 51.

great

great outlines of the Engliſh law, and tracing them up to their principles: and it is the duty of ſuch a one to hint them with decency to thoſe, whoſe abilities and ſtations enable them to apply the remedy. Having therefore premiſed this apology for ſome of the enſuing remarks, which might otherwiſe ſeem to ſavour of arrogance, I proceed now to conſider (in the firſt place) the general nature of *crimes*.

I. A CRIME, or miſdemeſnor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and miſdemeſnors; which, properly ſpeaking, are mere ſynonymous terms: though, in common uſage, the word "crimes" is made to denote ſuch offences as are of a deeper and more atrocious dye; while ſmaller faults, and omiſſions of leſs conſequence, are comprized under the gentler names of "miſdemeſnors" only (2).

THE diſtinction of public wrongs from private, of crimes and miſdemeſnors from civil injuries, ſeems principally to conſiſt in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, conſidered merely as individuals: public wrongs, or crimes and miſdemeſnors, are a breach and violation of the public rights and duties, due to the whole community, conſidered as a community, in it's ſocial aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in poſſeſſion of the land: but treaſon, murder, and robbery are properly ranked among crimes; ſince, beſides the injury done to individuals, they ſtrike at the

(2) In the Engliſh law, *miſdemeanour* is generally uſed in contradiſtinction to *felony*, and miſdemeanours comprehend all indictable offences, which do not amount to felony; as perjury, battery, libels, conſpiracies, attempts, and ſolicitations to commit felonies, &c.

very being of ſociety, which cannot poſſibly ſubſiſt, where actions of this ſort are ſuffered to eſcape with impunity (3).

[6] IN all caſes the crime includes an injury: every public offence is alſo a private wrong, and ſomewhat more; it affects the individual, and it likewiſe affects the community. Thus treaſon in imagining the king's death involves in it conſpiracy againſt an individual, which is alſo a civil injury; but as this ſpecies of treaſon in it's conſequences principally tends to the diſſolution of government, and the deſtruction thereby of the order and peace of ſociety, this denominates it a crime of the higheſt magnitude. Murder is an injury to the life of an individual; but the law of ſociety conſiders principally the loſs which the ſtate ſuſtains by being deprived of a member, and the pernicious example thereby ſet for others to do the like. Robbery may be conſidered in the ſame view: it is an injury to *private* property; but were that all, a civil ſatisfaction in damages might atone for it: the *public* miſchief is the thing, for the prevention of which our laws have made it a capital offence. In theſe groſs and atrocious injuries the private wrong is ſwallowed up in the public: we ſeldom hear any mention

---

(3) The diſtinction between public crimes and private injuries ſeems entirely to be created by poſitive laws, and is referable only to civil inſtitutions. Every violation of a moral law, or natural obligation, is an injury, for which the offender ought to make retribution to the individuals who immediately ſuffer from it; and it is alſo a crime, for which he ought to be puniſhed to that extent, which would deter both him and others from a repetition of the offence. In poſitive laws thoſe acts are denominated injuries, for which the legiſlature has only provided retribution, or a compenſation in damages; but when from experience it is diſcovered that this is not ſufficient to reſtrain within moderate bounds certain claſſes of injuries, it then becomes neceſſary for the legiſlative power to raiſe them into crimes, and to endeavour to repreſs them by the terror of puniſhment, or the ſword of the public magiſtrate.

made of ſatisfaction to the individual; the ſatisfaction to the community being ſo very great. And indeed, as the public crime is not otherwiſe avenged than by forfeiture of life and property, it is impoſſible afterwards to make any reparation for the private wrong: which can only be had from the body or goods of the aggreſſor. But there are crimes of an inferior nature, in which the public puniſhment is not ſo ſevere, but it affords room for a private compenſation alſo: and herein the diſtinction of crimes from civil injuries is very apparent. For inſtance; in the caſe of battery, or beating another, the aggreſſor may be indicted for this at the ſuit of the king, for diſturbing the public peace, and be puniſhed criminally by fine and impriſonment: and the party beaten may alſo have his private remedy by action of treſpaſs for the injury which he in particular ſuſtains, and recover a civil ſatisfaction in damages. So alſo, in caſe of a public nuiſance, as digging a ditch acroſs a highway, this is puniſhable by indictment, as a common offence to the whole kingdom and all his majeſty's ſubjects: but if any individual ſuſtains any ſpecial damage thereby, as [7] laming his horſe, breaking his carriage, or the like, the offender may be compelled to make ample ſatisfaction, as well for the private injury, as for the public wrong.

UPON the whole we may obſerve, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: *viz.* not only to redreſs the party injured, by either reſtoring to him his right, if poſſible; or by giving him an equivalent; the manner of doing which was the object of our inquiries in the preceding book of theſe commentaries; but alſo to ſecure to the public the benefit of ſociety, by preventing or puniſhing every breach and violation of thoſe laws, which the ſovereign power has thought proper to eſtabliſh for the government and tranquillity of the whole. What theſe breaches are, and how prevented or puniſhed, are to be conſidered in the preſent book.

II. THE nature of *crimes and miſdemeſnors* in general being thus aſcertained and diſtinguiſhed, I proceed, in the next

place, to consider the general nature of *punishments*: which are evils or inconveniences consequent upon crimes and misdemesnors; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehaviour in those, to regulate whose conduct such laws were respectively made. And herein we will briefly consider the *power*, the *end*, and the *measure* of human punishment.

1. As to the *power* of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemesnors [h]. It is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any *one*, it must also be vested in *all* mankind; [8] since all are by nature equal. Whereof the first murderer Cain was so sensible, that we find him [i] expressing his apprehensions, that *whoever* should find him would slay him. In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community. And to this precedent natural power of individuals must be referred that right, which some have argued to belong to every state, (though, in fact, never exercised by any,) of punishing not only their own subjects, but also foreign ambassadors, even with death itself; in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt [k].

[h] See Grotius, *de j. b. & p. l.* 2. c. 20. Puffendorf, L. of Nat. & N. b. 8. c. 3.

[i] Gen. iv. 14.

[k] See Vol. I. pag. 254.

As

As to offences merely againſt the laws of ſociety, which are only *mala prohibita*, and not *mala in ſe*; the temporal magiſtrate is alſo empowered to inflict coërcive penalties for ſuch tranſgreſſions: and this by the conſent of individuals; who, in forming ſocieties, did either tacitly or expreſsly inveſt the ſovereign power with the right of making laws, and of enforcing obedience to them when made, by exerciſing, upon their non-obſervance, ſeverities adequate to the evil. The lawfulneſs therefore of puniſhing ſuch criminals is founded upon this principle, that the law by which they ſuffer was made by their own conſent; it is a part of the original contract into which they entered, when firſt they engaged in ſociety; it was calculated for, and has long contributed to, their own ſecurity.

THIS right therefore, being thus conferred by univerſal conſent, gives to the ſtate exactly the ſame power, and no more, over all it's members, as each individual member had naturally over himſelf or others. Which has occaſioned [9]
ſome to doubt, how far a human legiſlature ought to inflict capital puniſhments for *poſitive* offences; offences againſt the municipal law only, and not againſt the law of nature: ſince no individual has, naturally, a power of inflicting death upon himſelf or others for actions in themſelves indifferent. With regard to offences *mala in ſe*, capital puniſhments are in ſome inſtances inflicted by the immediate *command* of God himſelf to all mankind; as in the caſe of murder, by the precept delivered to Noah, their common anceſtor and repreſentative, "whoſo ſheddeth man's blood, by man ſhall "his blood be ſhed[1]." In other inſtances they are inflicted after the *example* of the Creator, in his poſitive code of laws for the regulation of the Jewiſh republic; as in the caſe of the crime againſt nature. But they are ſometimes inflicted without ſuch expreſs warrant or example, at the will and diſcretion of the human legiſlature; as for forgery, for theft, and ſometimes for offences of a lighter kind. Of theſe we are principally to ſpeak: as theſe crimes are, none of them,

[1] Gen. ix. 6.

offences againſt natural, but only againſt ſocial rights; not even theft itſelf, unleſs it be accompanied with violence to one's houſe or perſon: all others being an infringement of that right of property, which, as we have formerly ſeen[m], owe it's origin not to the law of nature, but merely to civil ſociety (4).

THE practice of inflicting capital puniſhments, for offences of human inſtitution, is thus juſtified by that great and good man, ſir Matthew Hale[n]: "when offences grow "enormous, frequent, and dangerous to a kingdom or ſtate, "deſtructive or highly pernicious to civil ſocieties, and to "the great inſecurity and danger of the kingdom or it's in- "habitants, ſevere puniſhment and even death itſelf is ne- "ceſſary to be annexed to laws in many caſes by the pru- "dence of lawgivers." It is therefore the enormity, or dangerous tendency, of the crime, that alone can warrant any earthly legiſlature in putting him to death that commits it.
[10] It is not it's frequency only, or the difficulty of otherwiſe preventing it, that will excuſe our attempting to prevent it by a wanton effuſion of human blood. For, though the end of puniſhment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; ſince there may be unlawful methods of enforcing obedience even to the juſteſt laws. Every humane legiſlator will be therefore extremely cautious of

[m] Book II. c. 1. [n] 1 Hal. P. C. 13.

(4) It is ſtrange that the learned Judge's concluſion, *viz.* that *theft itſelf is not an offence againſt natural rights*, did not lead him to ſuſpect the fallacy of the poſition, that *the right of property owes it's origin not to the law of nature, but merely to civil ſociety*, which he has alſo advanced in a former volume, (2 vol. p. 11.) and which I have there preſumed to controvert. If theft is not a violation of the law of nature and reaſon, it would follow that there is no moral turpitude in diſhoneſty. "Non igitur magis eſt contra "naturam morbus aut egeſtas aut quid hujuſmodi quam detractio "aut appetitio alieni." CIC.

Thou ſhalt not ſteal, is certainly one of the firſt precepts both of nature and religion.

eſtabliſh-

eſtabliſhing laws that inflict the penalty of death, eſpecially for ſlight offences, or ſuch as are merely poſitive. He will expect a better reaſon for his ſo doing, than that looſe one which generally is given; that it is found by former experience that no lighter penalty will be effectual. For is it found upon farther experience, that capital puniſhments are more effectual? Was the vaſt territory of all the Ruſſias worſe regulated under the late empreſs Elizabeth, than under her more ſanguinary predeceſſors? Is it now, under Catherine II. leſs civilized, leſs ſocial, leſs ſecure? And yet we are aſſured, that neither of theſe illuſtrious princeſſes have, throughout their whole adminiſtration, inflicted the penalty of death: and the latter has, upon full perſuaſion of it's being uſeleſs, nay even pernicious, given orders for aboliſhing it entirely throughout her extenſive dominions [o]. But indeed, were capital puniſhments proved by experience to be a ſure and effectual remedy, that would not prove the neceſſity (upon which the juſtice and propriety depend) of inflicting them upon all occaſions when other expedients fail. I fear this reaſoning would extend a great deal too far. For inſtance, the damage done to our public roads by loaded waggons is univerſally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow, that it would be juſt for the legiſlature to inflict death upon every obſtinate carrier, who defeats or eludes the proviſion of former ſtatutes. Where the evil to be prevented is not adequate to the violence of the preventive, a ſovereign that thinks ſeriouſly can never juſtify ſuch a law to the dictates of conſcience and humanity. To ſhed the blood of our fellow-creature is a matter that requires the greateſt deliberation, and the fulleſt conviction of our own authority: for life is the immediate gift of God to man; which neither he can reſign, nor can it be taken from him, unleſs by the command or permiſſion of him who gave it; either expreſsly revealed, or collected from [11]

[o] Grand inſtructions for framing a new code of laws for the Ruſſian empire, § 210.

the

the laws of nature or ſociety by clear and indiſputable demonſtration.

I WOULD not be underſtood to *deny* the right of the legiſlature in any country to enforce it's own laws by the death of the tranſgreſſor, though perſons of ſome abilities have *doubted* it; but only to ſuggeſt a few hints for the conſideration of ſuch as are, or may hereafter become, legiſlators. When a queſtion ariſes, whether death may be lawfully inflicted for this or that tranſgreſſion, the wiſdom of the laws muſt decide it: and to this public judgment or deciſion all private judgments muſt ſubmit; elſe there is an end of the firſt principle of all ſociety and government. The guilt of blood, if any, muſt lie at their doors, who miſinterpret the extent of their warrant; and not at the doors of the ſubject, who is bound to receive the interpretations that are given by the ſovereign power.

2. As to the *end*, or final cauſe of human puniſhments. This is not by way of atonement or expiation for the crime committed; for that muſt be left to the juſt determination of the Supreme Being: but as a precaution againſt future offences of the ſame kind. This is effected three ways: either by the amendment of the offender himſelf; for which purpoſe all corporal puniſhments, fines, and temporary exile or impriſonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, "*ut* "*poena* (as Tully[p] expreſſes it) *ad paucos, metus ad omnes,* "*perveniat;*" which gives riſe to all ignominious puniſhments, and to ſuch executions of juſtice as are open and
[12] public: or laſtly, by depriving the party injuring of the power to do future miſchief; which is effected by either putting him to death, or condemning him to perpetual confinement, ſlavery, or exile. The ſame one end, of preventing future crimes, is endeavoured to be anſwered by each of theſe three ſpecies of puniſhment. The public gains equal ſecurity, whether the offender himſelf be amended by whole-

[p] *pro Cluentio*, 46.

ſome

ſome correction, or whether he be diſabled from doing any farther harm: and if the penalty fails of both theſe effects, as it may do, ſtill the terror of his example remains as a warning to other citizens. The method however of inflicting puniſhment ought always to be proportioned to the particular purpoſe it is meant to ſerve, and by no means to exceed it: therefore the pains of death, and perpetual diſability by exile, ſlavery, or impriſonment, ought never to be inflicted, but when the offender appears incorrigible: which may be collected either from a repetition of minuter offences; or from the perpetration of ſome one crime of deep malignity, which of itſelf demonſtrates a diſpoſition without hope or probability of amendment: and in ſuch caſes it would be cruelty to the public, to defer the puniſhment of ſuch a criminal, till he had an opportunity of repeating perhaps the worſt of villanies.

3. As to the *meaſure* of human puniſhments. From what has been obſerved in the former articles we may collect, that the quantity of puniſhment can never be abſolutely determined by any ſtanding invariable rule; but it muſt be left to the arbitration of the legiſlature to inflict ſuch penalties as are warranted by the laws of nature and ſociety, and ſuch as appear to be the beſt calculated to anſwer the end of precaution againſt future offences.

HENCE it will be evident, that what ſome have ſo highly extolled for it's equity, the *lex talionis*, or law of retaliation, can never be in all caſes an adequate or permanent rule of puniſhment. In ſome caſes indeed it ſeems to be dictated by natural reaſon; as in the caſe of conſpiracies to do an injury, or falſe accuſations of the innocent: to which we may add that law of the Jews and Egyptians, mentioned by Joſephus [13] and Diodorus Siculus, that whoever without ſufficient cauſe was found with any mortal poiſon in his cuſtody, ſhould himſelf be obliged to take it. But, in general, the difference of perſons, place, time, provocation, or other circumſtances, may enhance or mitigate the offence; and in ſuch caſes

caſes retaliation can never be a proper meaſure of juſtice. If a nobleman ſtrikes a peaſant, all mankind will ſee, that if a court of juſtice awards a return of the blow, it is more than a juſt compenſation. On the other hand, retaliation may, ſometimes, be too eaſy a ſentence; as, if a man maliciouſly ſhould put out the remaining eye of him who had loſt one before, it is too ſlight a puniſhment for the maimer to loſe only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this inſtance judiciouſly altered: by decreeing, in imitation of Solon's laws[q], that he who ſtruck out the eye of a one-eyed man, ſhould loſe both his own in return. Beſides, there are very many crimes, that will in no ſhape admit of theſe penalties, without manifeſt abſurdity and wickedneſs. Theft cannot be puniſhed by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that thoſe inſtances, wherein retaliation appears to be uſed, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the ſame hurt he has done to his neighbour and no more; but this correſpondence between the crime and puniſhment is barely a conſequence from ſome other principle. Death is ordered to be puniſhed with death; not becauſe one is equivalent to the other, for that would be expiation, and not puniſhment. Nor is death always an equivalent for death: the execution of a needy decrepid aſſaſſin is a poor ſatisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune. But the reaſon upon which this ſentence is grounded ſeems to be, that this is the higheſt penalty than man can inflict, and
[14] tends moſt to the ſecurity of mankind; by removing one murderer from the earth, and ſetting a dreadful example to deter others: ſo that even this grand inſtance proceeds upon other principles than thoſe of retaliation. And truly, if any meaſure of puniſhment is to be taken from the damage ſuſtained by the ſufferer, the puniſhment ought rather to ex-

[q] Pott. Ant. b. 1. c. 26.

ceed

ceed than equal the injury: since it seems contrary to reason and equity, that the guilty (if convicted) should suffer no more than the innocent has done before him; especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which consist merely in the intention, and are not yet carried into act, as conspiracies and the like; the innocent has a chance to frustrate or avoid the villany, as the conspirator has also a chance to escape his punishment: and this may be one reason why the *lex talionis* is more proper to be inflicted, if at all, for crimes that consist in intention, than for such as are carried into act. It seems indeed consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writers[r], that the punishment due to the crime of which one falsely accuses another, should be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by statute 37 Edw. III. ch. 18. that such as preferred any suggestions to the king's great council should put in sureties of taliation; that is, to incur the same pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its stead [s].

BUT though from what has been said it appears, that there cannot be any regular or determinate method of rating the quantity of punishments for crimes, by any one uniform [15] rule; but they must be referred to the will and discretion of the legislative power: yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in allotting it an adequate punishment.

[r] Beccar. c. 15. [s] Stat. 38 Edw. III. c. 9.

As,

As, firſt, with regard to the *object* of it: for the greater and more exalted the object of an injury is, the more care ſhould be taken to prevent that injury, and of courſe under this aggravation the puniſhment ſhould be more ſevere. Therefore treaſon in conſpiring the *king*'s death is by the Engliſh law puniſhed with greater rigour than even actually killing any private ſubject. And yet, generally, a deſign to tranſgreſs is not ſo flagrant an enormity, as the actual completion of that deſign. For evil, the nearer we approach it, is the more diſagreeable and ſhocking; ſo that it requires more obſtinacy in wickedneſs to perpetrate an unlawful action, than barely to entertain the thought of it: and it is an encouragement to repentance and remorſe, even till the laſt ſtage of any crime, that it never is too late to retract; and that if a man ſtops even here, it is better for him than if he proceeds: for which reaſon an attempt to rob, to raviſh, or to kill, is far leſs penal than the actual robbery, rape, or murder. But in the caſe of a treaſonable conſpiracy, the object whereof is the king's majeſty, the bare intention will deſerve the higheſt degree of ſeverity; not becauſe the intention is equivalent to the act itſelf; but becauſe the greateſt rigour is no more than adequate to a treaſonable purpoſe of the heart, and there is no greater left to inflict upon the actual execution itſelf.

AGAIN: the violence of paſſion, or temptation, may ſometimes alleviate a crime; as theft, in caſe of hunger, is far more worthy of compaſſion, than when committed through avarice, or to ſupply one in luxurious exceſſes. To kill a man upon ſudden and violent reſentment, is leſs penal than upon cool deliberate malice. The age, education, and character of the offender; the repetition (or otherwiſe) of
[16] the offence; the time, the place, the company wherein it was committed; all theſe, and a thouſand other incidents, may aggravate or extenuate the crime[t].

[t] Thus Demoſthenes (in his oration againſt Midias) finely works up the aggravations of the inſults he had received. "I was abuſed, ſays he, by "my enemy, in cold blood, out of "malice, not by heat of wine, in the "morning, publicly, before ſtrangers "as well as citizens; and that in the "temple, whither the duty of my "office called me."

FARTHER:

FARTHER: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness [v]: and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit; according to what Cicero observes [u], "*ea sunt animadvertenda peccata maxime, quae difficillime praecaventur.*" Hence it is, that for a servant to rob his master is in more cases capital, than for a stranger: if a servant kills his master, it is a species of treason; in another it is only murder: to steal a handkerchief, or other trifle of above the value of twelvepence, privately from one's person, is made capital; but to carry off a load of corn from an open field, though of fifty times greater value, is punished with transportation only. And, in the island of Man, this rule was formerly carried so far, that to take away an horse or an ox was there no felony, but a trespass, because of the difficulty in that little territory to conceal them or carry them off: but to steal a pig or a fowl, which is easily done, was a capital misdemesnor, and the offender was punished with death [w].

LASTLY: as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious [17] writer, who seems to have well studied the springs of human action [x], that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment. For the exceffive severity of laws (says Montesquieu [y]) hinders their

[v] Beccar. c. 6.
[u] *pro Sexto Roscio.* 42.
[w] 4 Inst. 285.
[x] Beccar. c. 7.
[y] Sp. L. b. 6. c. 13.

execution: when the puniſhment ſurpaſſes all meaſure, the public will frequently out of humanity prefer impunity to it. Thus alſo the ſtatute 1 Mar. ſt. 1. c. 1. recites in it's preamble, "that the ſtate of every king conſiſts more aſſuredly "in the love of the ſubject towards their prince, than in the "dread of laws made with rigorous pains; and that laws "made for the preſervation of the commonwealth without "great penalties are more often obeyed and kept, than laws "made with extreme puniſhments." Happy had it been for the nation, if the ſubſequent practice of that deluded princeſs in matters of religion, had been correſpondent to theſe ſentiments of herſelf and parliament, in matters of ſtate and government! We may farther obſerve that ſanguinary laws are a bad ſymptom of the diſtemper of any ſtate, or at leaſt of it's weak conſtitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel puniſhments: the Porcian law, which exempted all citizens from ſentence of death, ſilently abrogated them all. In this period the republic flouriſhed: under the emperors ſevere puniſhments were revived; and then the empire fell.

IT is moreover abſurd and impolitic to apply the ſame puniſhment to crimes of different malignity. A multitude of ſanguinary laws (beſides the doubt that may be entertained concerning the right of making them) do likewiſe prove a manifeſt defect either in the wiſdom of the legiſlative, or the ſtrength of the executive power. It is a kind of quackery in government, and argues a want of ſolid ſkill, to apply the ſame univerſal remedy, the *ultimum ſupplicium*, to every caſe of difficulty. It is, it muſt be owned, much *eaſier* to extirpate than to amend mankind: yet
[18] that magiſtrate muſt be eſteemed both a weak and a cruel ſurgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniouſly propoſed [z], that in every ſtate a ſcale of crimes ſhould be formed, with a correſponding ſcale of pu-

[z] Beccar. c. 6.

niſhments,

niſhments, deſcending from the greateſt to the leaſt: but, if that be too romantic an idea, yet at leaſt a wiſe legiſlator will mark the principal diviſions, and not aſſign penalties of the firſt degree to offences of an inferior rank. Where men ſee no diſtinction made in the nature and gradations of puniſhment, the generality will be led to conclude there is no diſtinction in the guilt. Thus in France the puniſhment of robbery, either with or without murder, is the ſame [a]: hence it is, that though perhaps they are therefore ſubject to fewer robberies, yet they never rob but they alſo murder. In China murderers are cut to pieces, and robbers not: hence in that country they never murder on the highway, though they often rob. And in England, beſides the additional terrors of a ſpeedy execution, and a ſubſequent expoſure or diſſection, robbers have a hope of tranſportation, which ſeldom is extended to murderers. This has the ſame effect here as in China; in preventing frequent aſſaſſination and ſlaughter.

YET, though in this inſtance we may glory in the wiſdom of the Engliſh law, we ſhall find it more difficult to juſtify the frequency of capital puniſhment to be found therein; inflicted (perhaps inattentively) by a multitude of ſucceſſive independent ſtatutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no leſs than an hundred and ſixty have been declared by act of parliament [b] to be felonies without benefit of clergy; or, in other words, to be worthy of inſtant death. So dreadful a liſt, inſtead of diminiſhing, increaſes the number of offenders. The injured, through compaſſion, will often forbear to pro- [19] ſecute: juries, through compaſſion, will ſometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compaſſion, will reſpite one half of the convicts, and recommend them to the

[a] Sp. L. b. 6. c. 16.

[b] See Ruffhead's index to the ſtatutes (tit. felony), and the acts which have ſince been made.

royal mercy. Among so many chances of escaping, the needy and hardened offender overlooks the multitude that suffer: he boldly engages in some desperate attempt, to relieve his wants or supply his vices; and, if unexpectedly the hand of justice overtakes him, he deems himself peculiarly unfortunate, in falling at last a sacrifice to those laws, which long impunity has taught him to contemn.

CHAPTER THE SECOND.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

HAVING, in the preceding chapter, conſidered in general the nature of crimes, and puniſhments, we are next led, in the order of our diſtribution, to inquire what perſons are, or are not, *capable* of committing crimes; or, which is all one, who are exempted from the cenſures of the law upon the commiſſion of thoſe acts, which in other perſons would be ſeverely puniſhed. In the proceſs of which inquiry, we muſt have recourſe to particular and ſpecial exceptions: for the general rule is, that no perſon ſhall be excuſed from puniſhment for diſobedience to the laws of his country, excepting ſuch as are expreſsly defined and exempted by the laws themſelves.

ALL the ſeveral pleas and excuſes, which protect the committer of a forbidden act from the puniſhment which is otherwiſe annexed thereto, may be reduced to this ſingle conſideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, ſo neither can it induce any guilt: the concurrence of the will, when it has it's choice either to do or to avoid the fact in queſtion, being the only thing that renders human actions either praiſeworthy or culpable. [21] Indeed, to make a complete crime cognizable by human laws, there muſt be both a will and an act. For though *in foro conſcientiae*, a fixed deſign or will to do an unlawful act is almoſt as heinous as the commiſſion of it, yet, as no temporal tribunal can ſearch the heart, or fathom the intentions of the mind, otherwiſe than as they are demonſtrated by outward actions, it therefore cannot puniſh for what it can-

not know. For which reaſon in all temporal juriſdictions an *overt* act, or ſome open evidence of an intended crime, is neceſſary, in order to demonſtrate the depravity of the will, before the man is liable to puniſhment. And, as a vitious will without a vitious act is no civil crime, ſo, on the other hand, an unwarrantable act without a vitious will is no crime at all. So that to conſtitute a crime againſt human laws, there muſt be, firſt, a vitious will; and, ſecondly, an unlawful act conſequent upon ſuch vitious will.

Now there are three caſes, in which the will does not join with the act: 1. Where there is a defect of underſtanding. For where there is no diſcernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing elſe but a determination of one's choice to do or to abſtain from a particular action: he therefore, that has no underſtanding, can have no will to guide his conduct. 2. Where there is underſtanding and will ſufficient, reſiding in the party; but not called forth and exerted at the time of the action done; which is the caſe of all offences committed by chance or ignorance. Here the will ſits neuter; and neither concurs with the act, nor diſagrees to it. 3. Where the action is conſtrained by ſome outward force and violence. Here the will counteracts the deed; and is ſo far from concurring with, that it loaths and diſagrees to, what the man is obliged to perform. It will be the buſineſs of the preſent chapter briefly to conſider all the ſeveral ſpecies of defect in will, as they fall under ſome one or other of theſe general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the firſt claſs; misfortune, and ignorance, which
[22] may be referred to the ſecond; and compulſion or neceſſity, which may properly rank in the third.

I. First, we will conſider the caſe of *infancy*, or nonage; which is a defect of the underſtanding. Infants, under the age of diſcretion, ought not to be puniſhed by any criminal proſecution whatever[a]. What the age of diſcretion is, in

[a] 1 Hawk. P.C. 2.

various

various nations, is matter of ſome variety. The civil law diſtinguiſhed the age of minors, or thoſe under twenty-five years old, into three ſtages: *infantia*, from the birth till ſeven years of age; *pueritia*, from ſeven to fourteen; and *pubertas*, from fourteen upwards. The period of *pueritia*, or childhood, was again ſubdivided into two equal parts: from ſeven to ten and an half was *aetas infantiae proxima*; from ten and an half to fourteen was *aetas pubertati proxima*. During the firſt ſtage of infancy, and the next half ſtage of childhood, *infantiae proxima*, they were not puniſhable for any crime [b]. During the other half ſtage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed puniſhable, if found to be *doli capaces*, or capable of miſchief: but with many mitigations, and not with the utmoſt rigour of the law [c]. During the laſt ſtage (at the age of puberty, and afterwards) minors were liable to be puniſhed, as well capitally, as otherwiſe.

THE law of England does in ſome caſes privilege an infant, under the age of twenty-one, as to common miſdemeſnors; ſo as to eſcape fine, impriſonment, and the like: and particularly in caſes of omiſſion, as not repairing a bridge, or a highway, and other ſimilar offences [d]: for, not having the command of his fortune till twenty-one, he wants the capacity to do thoſe things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at leaſt as liable as others to commit,) for theſe an infant, above the age of fourteen, is equally liable to ſuffer, as a perſon of the full age of twenty-one. [23]

WITH regard to capital crimes, the law is ſtill more minute and circumſpect; diſtinguiſhing with greater nicety the ſeveral degrees of age and diſcretion. By the antient Saxon law, the age of twelve years was eſtabliſhed for the age of poſſible diſcretion, when firſt the underſtanding might open [e]: and from thence till the offender was fourteen, it was *aetas*

[b] *Inſt.* 3. 20. 10.
[c] *Ff.* 29. 5. 14. 50. 17. 111. 47. 2. 23.
[d] 1 Hal. P. C. 20, 21, 22.
[e] *LL. Athelſtan.* Wilk. 65.

pubertati proxima, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious ſtage of diſcretion: but, under twelve it was held that he could not be guilty in will, neither after fourteen could he be ſuppoſed innocent, of any capital crime which he in fact committed. But by the law, as it now ſtands, and has ſtood at leaſt ever ſince the time of Edward the third, the capacity of doing ill, or contracting guilt, is not ſo much meaſured by years and days, as by the ſtrength of the delinquent's underſtanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in theſe caſes our maxim is, that "*malitia* "*ſupplet ætatem.*" Under ſeven years of age indeed an infant cannot be guilty of felony [e]; for then a felonious diſcretion is almoſt an impoſſibility in nature: but at eight years old he may be guilty of felony [f]. Alſo, under fourteen, though an infant ſhall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury, that he was *doli capax*, and could diſcern between good and evil, he may be convicted and ſuffer death. Thus a girl of thirteen has been burnt for killing her miſtreſs: and one boy of ten, and another of nine years old, who had killed their companions, have been ſentenced to death, and he of ten years actually hanged; becauſe it appeared upon their trials, that the one hid himſelf, and the other hid the body he had killed, which hiding manifeſted a conſciouſneſs of guilt, and a diſcretion
[24] to diſcern between good and evil [g]. And there was an inſtance in the laſt century, where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly [h]. Thus alſo, in very modern times, a boy of ten years old was convicted on his own confeſſion of murdering his bedfellow, there appearing in his whole behaviour plain tokens of a miſchievous diſcretion; and, as the ſparing this boy merely on account of his tender years might be of dangerous conſequence to the

[e] Mir. c. 4. § 16. 1 Hal. P. C. 27.
[f] Dalt. Juſt. c. 147.
[g] 1 Hal. P. C. 26, 27.
[h] Emlyn on 1 Hal. P. C. 25.

public,

public, by propagating a notion that children might commit ſuch atrocious crimes with impunity, it was unanimouſly agreed by all the judges that he was a proper ſubject of capital puniſhment [i]. But, in all ſuch caſes, the evidence of that malice which is to ſupply age, ought to be ſtrong and clear beyond all doubt and contradiction.

II. THE ſecond caſe of a deficiency in will, which excuſes from the guilt of crimes, ariſes alſo from a defective or vitiated underſtanding, *viz.* in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may eaſily be adapted alſo to the former, is, that "*furioſus furore ſolum punitur.*" In criminal caſes therefore idiots and lunatics are not chargeable for their own acts, if committed when under theſe incapacities: no, not even for treaſon itſelf [k]. Alſo, if a man in his ſound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; becauſe he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the priſoner becomes mad, he ſhall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loſes his ſenſes before judgment, judgment ſhall not be pronounced; and if, after judgment, he becomes of nonſane memory, execution ſhall be ſtayed: for peradventure, ſays the humanity of the Engliſh law, had the priſoner been of ſound memory, he might have alleged ſomething in ſtay of judgment or execution [l] (1). Indeed, in the [25] bloody reign of Henry the eighth, a ſtatute was made [m],

[i] Foſter, 72.
[k] 3 Inſt. 6.
[l] 1 Hal. P. C. 34.
[m] 33 Hen. VIII. c. 20.

(1) If the puniſhment were leſs than death, and were inflicted upon a priſoner deprived of reaſon, it would be unproductive of one of the great ends of puniſhment, the correction of the criminal. Human tribunals are only juſtified in introducing the pain and evil of puniſhment, when it is likely to prevent that greater degree of evil, which would reſult from the unreſtrained commiſſion of crimes.

which

which enacted, that if a perſon, being *compos mentis*, ſhould commit high treaſon, and after fall into madneſs, he might be tried in his abſence, and ſhould ſuffer death, as if he were of perfect memory. But this ſavage and inhuman law was repealed by the ſtatute 1 & 2 Ph. & M. c. 10. For, as is obſerved by ſir Edward Coke [n], "the execution of an of-"fender is for example, *ut poena ad paucos, metus ad omnes* "*perveniat:* but ſo it is not when a madman is executed; "but ſhould be a miſerable ſpectacle, both againſt law, and "of extreme inhumanity and cruelty, and can be no example "to others." But if there be any doubt, whether the party be *compos* or not, this ſhall be tried by a jury. And if he be ſo found, a total idiocy, or abſolute inſanity, excuſes from the guilt, and of courſe from the puniſhment, of any criminal action committed under ſuch deprivation of the ſenſes: but, if a lunatic hath lucid intervals of underſtanding, he ſhall anſwer for what he does in thoſe intervals, as if he had no deficiency [o]. Yet, in the caſe of abſolute madmen, as they are not anſwerable for their actions, they ſhould not be permitted the liberty of acting unleſs under proper control; and, in particular, they ought not to be ſuffered to go looſe, to the terror of the king's ſubjects. It was the doctrine of our antient law, that perſons deprived of their reaſon might be confined till they recovered their ſenſes [p], without waiting for the forms of a commiſſion or other ſpecial authority from the crown: and now, by the vagrant acts [q], a method is chalked out for impriſoning, chaining, and ſending them to their proper homes (2).

[n] 3 Inſt. 6.
[o] 1 Hal. P. C. 31.
[p] Bro. *abr. tit. corone.* 101.
[q] 17 Geo. II. c. 5.

(2) Where it is dangerous to permit a lunatic to go abroad, two juſtices may order him to be apprehended and ſecured, even with chains, if neceſſary, and may ſend him by a vagrant paſs to the place of his ſettlement; and may order ſo much of his goods to be ſold, or the rents of his lands to be received, as will diſcharge the expence incurred; but ſuch ſum muſt be accounted for at the next ſeſſions;

III. THIRDLY; as to artificial, voluntarily contracted madneſs, by *drunkenneſs* or intoxication, which, depriving men of their reaſon, puts them in a temporary phrenzy; our law looks upon this as an aggravation of the offence, rather than as an excuſe for any criminal miſbehaviour. A drunk- [26] ard, ſays ſir Edward Coke[r], who is *voluntarius daemon*, hath no privilege thereby; but what hurt or ill ſoever he doth, his drunkenneſs doth aggravate it: *nam omne crimen ebrietas, et incendit, et detegit.* It hath been obſerved, that the real uſe of ſtrong liquors, and the abuſe of them by drinking to exceſs, depend much upon the temperature of the climate in which we live. The ſame indulgence, which may be neceſſary to make the blood move in Norway, would make an Italian mad. A German therefore, ſays the preſident Monteſquieu[s], drinks through cuſtom, founded upon conſtitutional neceſſity; a Spaniard drinks through choice, or out of the mere wantonneſs of luxury: and drunkenneſs, he adds, ought to be more ſeverely puniſhed, where it makes men miſchievous and mad, as in Spain and Italy, than where it only renders them ſtupid and heavy, as in Germany and more northern countries. And accordingly, in the warm climate of Greece, a law of Pittacus enacted, "that "he who committed a crime, when drunk, ſhould receive "a double puniſhment;" one for the crime itſelf, and the other for the ebriety which prompted him to commit it[t]. The Roman law indeed made great allowances for this vice: "*per vinum delapſis capitalis poena remittitur*[u]." But the law of England, conſidering how eaſy it is to counterfeit this excuſe, and how weak an excuſe it is, (though real,) will not ſuffer any man thus to privilege one crime by another[w].

[r] 1 Inſt. 247.
[s] Sp. L. b. 14. c. 10.
[t] Puff. L. of N. b. 8. c. 3.
[u] *Ff.* 49. 16. 6.
[w] Plowd. 19.

ſeſſions: but this does not preclude the juriſdiction of the chancellor, or prevent any relation or friend from taking the lunatic under his care. 17 *Geo. II. c.* 5. § 21. See p. 396. n. 2.

IV. A

IV. A FOURTH deficiency of will, is where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this, when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing, that if any accidental mischief hap-
[27] pens to follow from the performance of a *lawful* act, the party stands excused from all guilt: but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour [x] (3).

V. FIFTHLY; *ignorance*, or *mistake*, is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action [y]: but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so; this is wilful murder. For a mistake in point of law, which every person of discretion

[x] 1 Hal. P. C. 39. [y] Cro. Car. 538.

(3) But a very important distinction is made in such cases, *viz.* whether the unlawful act is also in it's original nature wrong and mischievous, for a person is not answerable for the incidental consequences of an unlawful act, which is merely a *malum prohibitum*; as where any unfortunate accident happens from an unqualified person being in pursuit of game, he is amenable only to the same extent as a man duly qualified. *Foſt.* 259. 1 *Hal. P. C.* 475.

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not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law[z], as it was of the Roman[a].

VI. A SIXTH species of defect of will is that arising from *compulsion* and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion.

1. OF this nature, in the first place, is the obligation of [28] *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiae*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my business to decide; though the question I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff, who burnt Latimer and Ridley, in the bigoted days of queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of it's merciless sister, persecution.

As to persons in private relations; the principal case, where constraint of a superior is allowed as an excuse for cri-

z Plowd. 343. a *If.* 22. 6. 9.

minal

minal miſconduct, is with regard to the matrimonial ſubjection of the wife to her huſband: for neither a ſon nor a ſervant are excuſed for the commiſſion of any crime, whether capital or otherwiſe, by the command or coërcion of the parent or maſter[b]; though in ſome caſes the command or authority of the huſband, either expreſs or implied, will privilege the wife from puniſhment, even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences againſt the laws of ſociety, by the coërcion of her huſband; or even in his company, which the law conſtrues a coërcion; ſhe is not guilty of any crime; being conſidered as acting by compulſion and not of her own will[c]. Which doctrine is at leaſt a thouſand years old in this kingdom, being to be found among the laws of king
[29] Ina, the Weſt Saxon[d]. And it appears that, among the northern nations on the continent, this privilege extended to any woman tranſgreſſing in concert with a man, and to any ſervant that committed a joint offence with a freeman; the male or freeman only was puniſhed, the female or ſlave diſmiſſed; "*proculdubio quod alterum libertas, alterum neceſſitas* "*impelleret*[e]." But (beſides that in our law, which is a ſtranger to ſlavery, no impunity is given to ſervants, who are as much free agents as their maſters) even with regard to wives, this rule admits of an exception in crimes that are *mala in ſe*, and prohibited by the law of nature, as murder and the like (4): not only becauſe theſe are of a deeper dye, but alſo, ſince in a ſtate of nature no one is in ſubjection to another, it would be unreaſonable to ſcreen an offender from the puniſhment due to natural crimes, by the refinements and ſubordinations of civil ſociety. In treaſon alſo, (the higheſt crime which a member of ſociety can, as ſuch, be guilty of,)

[b] 1 Hawk. P. C. 3.
[c] 1 Hal. P. C. 45.
[d] *cap.* 57.
[e] Stiernh. *de jure Sueon. l.* 2, *c.* 4.

(4) The law ſeems to protect the wife in all felonies committed by her in company with her huſband, except murder and manſlaughter. 1 *Hal. P. C.* 47.

no plea of coverture ſhall excuſe the wife; no preſumption of the huſband's coërcion ſhall extenuate her guilt[f]: as well becauſe of the odiouſneſs and dangerous conſequences of the crime itſelf, as becauſe the huſband, having broken through the moſt ſacred tie of ſocial community by rebellion againſt the ſtate, has no right to that obedience from a wife, which he himſelf as a ſubject has forgotten to pay. In inferior miſdemeſnors alſo, we may remark another exception; that a wife may be indicted and ſet in the pillory *with* her huſband, for keeping a brothel; for this is an offence touching the domeſtic oeconomy or government of the houſe, in which the wife has a principal ſhare; and is alſo ſuch an offence as the law preſumes to be generally conducted by the intrigues of the female ſex[g](4). And in all caſes, where the wife offends alone, without the company or coërcion of her huſband, ſhe is reſponſible for her offence, as much as any feme-ſole.

2. ANOTHER ſpecies of compulſion or neceſſity is what [30] our law calls *dureſs per minas*[h]; or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reaſon the guilt of many crimes and miſdemeſnors; at leaſt before the human tribunal. But then that fear, which compels a man to do an unwarrantable ac-

[f] 1 Hal. P. C. 47. [g] 1 Hawk. P. C. 2, 3. [h] See Vol. I. pag. 131.

(4) In all miſdemeanours it appears that the wife may be found guilty with the huſband. It is ſaid, the reaſon why ſhe was excuſed in burglary, larceny, &c. was becauſe ſhe could not tell what property the huſband might claim in the goods. 10 *Mod.* 63 and 335. But the better reaſon ſeems to be, that by the antient law the huſband had the benefit of the clergy, if he could read, but in no caſe could women have that benefit; it would therefore have been an odious proceeding to have executed the wife, and to have diſmiſſed the huſband with a ſlight puniſhment: to avoid this, it was thought better that in ſuch caſes ſhe ſhould be altogether acquitted; but this reaſon did not apply to miſdemeanours.

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tion, ought to be juſt and well-grounded; ſuch "*qui cadere* "*poſſit in virum conſtantem, non timidum et meticuloſum,*" as Bracton expreſſes it [i], in the words of the civil law [k]. Therefore, in time of war or rebellion, a man may be juſtified in doing many treaſonable acts by compulſion of the enemy or rebels, which would admit of no excuſe in the time of peace [l](5). This however ſeems only, or at leaſt principally, to hold as to poſitive crimes, ſo created by the laws of ſociety; and which therefore ſociety may excuſe; but not as to natural offences ſo declared by the law of God, wherein human magiſtrates are only the executioners of divine puniſhment. And therefore though a man be violently aſſaulted, and hath no other poſſible means of eſcaping death, but by killing an innocent perſon: this fear and force ſhall not acquit him of murder; for he ought rather to die himſelf, than eſcape by the murder of an innocent [m]. But in ſuch a caſe he is permitted to kill the aſſailant; for there the law of nature, and ſelf-defence, its primary canon, have made him his own protector.

3. THERE is a third ſpecies of neceſſity, which may be diſtinguiſhed from the actual compulſion of external force or fear; being the reſult of reaſon and reflection, which act upon and conſtrain a man's will, and oblige him to do an action, which without ſuch obligation would be criminal. And that is, when a man has his choice of two evils ſet before

[i] *l.* 2. *f.* 16.
[k] *Ff.* 4. 2. 5 & 6.
[l] 1 Hal. P. C. 50.
[m] 1 Hal. P. C. 51.

(5) The fear of having houſes burnt or goods ſpoiled is no excuſe in the eye of the law for joining and marching with rebels. The only force that doth excuſe, is a force upon the *perſon*, and preſent fear of death; and this force and fear muſt continue all the time the party remains with the rebels. It is incumbent upon men, who make force their defence, to ſhew an actual force, and that they joined *pro timore mortis, et receſſerunt quum cito potuerunt. Foſt.* 14. 216.

him, and, being under a neceſſity of chuſing one, he chuſes the leaſt pernicious of the two. Here the will cannot be ſaid [31] freely to exert itſelf, being rather paſſive than active; or, if active, it is rather in rejecting the greater evil than in chuſing the leſs. Of this ſort is that neceſſity, where a man by the commandment of the law is bound to arreſt another for any capital offence, or to diſperſe a riot, and reſiſtance is made to his authority: it is here juſtifiable and even neceſſary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to eſcape, or the riot to continue. For the preſervation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmoſt conſequence to the public; and therefore excuſe the felony, which the killing would otherwiſe amount to[n].

4. THERE is yet another caſe of neceſſity, which has occaſioned great ſpeculation among the writers upon general law; *viz.* whether a man in extreme want of food or cloathing may juſtify ſtealing either, to relieve his preſent neceſſities? And this both Grotius[o] and Puffendorf[p], together with many other of the foreign juriſts, hold in the affirmative; maintaining by many ingenious, humane, and plauſible reaſons, that in ſuch caſes the community of goods by a kind of tacit conceſſion of ſociety is revived. And ſome even of our own lawyers have held the ſame[q], though it ſeems to be an unwarranted doctrine, borrowed from the notions of ſome civilians: at leaſt it is now antiquated, the law of England admitting no ſuch excuſe at preſent[r]. And this it's doctrine is agreeable not only to the ſentiments of many of the wiſeſt antients, particularly Cicero[s], who holds that "*ſuum cuique incommodum ferendum eſt, potius quam* "*de alterius commodis detrahendum;*" but alſo to the Jewiſh law, as certified by king Solomon himſelf[t]: "if a thief "ſteal to ſatisfy his ſoul when he is hungry, he ſhall reſtore

[n] 1. Hal. P. C. 53.
[o] *de jure b. & p. l.* 2. *c.* 2.
[p] L. of Nat. and N. l. 2. c. 6.
[q] Britton. c. 10. Mirr. c. 4. § 16.
[r] 1 Hal. P. C. 54.
[s] *de off. l.* 3. *c.* 5.
[t] Prov. vi. 30.

" ſevenfold, and ſhall give all the ſubſtance of his houſe :" which was the ordinary puniſhment for theft in that kingdom. And this is founded upon the higheſt reaſon : for men's properties would be under a ſtrange inſecurity, if liable to be invaded according to the wants of others, of which wants no man can poſſibly be an adequate judge, but the party himſelf who pleads them. In this country eſpecially, there would be a peculiar impropriety in admitting ſo dubious an excuſe : for by our laws ſuch ſufficient proviſion is made for the poor by the power of the civil magiſtrate, that it is impoſſible that the moſt needy ſtranger ſhould ever be reduced to the neceſſity of thieving to ſupport nature. This caſe of a ſtranger is, by the way, the ſtrongeſt inſtance put by baron Puffendorf, and whereon he builds his principal arguments : which, however they may hold upon the continent, where the parſimonious induſtry of the natives orders every one to work or ſtarve, yet muſt loſe all their weight and efficacy in England, where charity is reduced to a ſyſtem, and interwoven in our very conſtitution. Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the neceſſitous ; eſpecially when we conſider, that the king, on the repreſentation of his miniſters of juſtice, hath a power to ſoften the law, and to extend mercy in caſes of peculiar hardſhip. An advantage which is wanting in many ſtates, particularly thoſe which are democratical : and theſe have in it's ſtead introduced and adopted, in the body of the law itſelf, a multitude of circumſtances tending to alleviate it's rigour. But the founders of our conſtitution thought it better to veſt in the crown the power of pardoning particular objects of compaſſion, than to countenance and eſtabliſh theft by one general undiſtinguiſhing law.

VII. To theſe ſeveral caſes, in which the incapacity of committing crimes ariſes from a deficiency of the will, we may add one more, in which the law ſuppoſes an incapacity of doing wrong, from the excellence and perfection of the
[33] perſon ; which extend as well to the will as to the other qualities

qualities of his mind. I mean the caſe of the king; who, by virtue of his royal prerogative, is not under the coërcive power of the law [v]; which will not ſuppoſe him capable of committing a folly, much leſs a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would be the conſequence if the king were to act thus and thus: ſince the law deems ſo highly of his wiſdom and virtue, as not even to preſume it poſſible for him to do any thing inconſiſtent with his ſtation and dignity; and therefore has made no proviſion to remedy ſuch a grievance. But of this ſufficient was ſaid in a former volume [u], to which I muſt refer the reader.

[v] 1 Hal. P. C. 44.

[u] Book I. ch. 7. pag. 244.

CHAPTER THE THIRD.

OF PRINCIPALS AND ACCESSORIES.

IT having been ſhewn in the preceding chapter what perſons are, or are not, upon account of their ſituation and circumſtances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among perſons that are capable of offending; *viz.* as *principal*, and as *acceſſory*.

I. A MAN may be *principal* in an offence in two degrees. A principal, in the firſt degree, is he that is the actor, or abſolute perpetrator of the crime; and, in the ſecond degree, he is who is preſent, aiding, and abetting the fact to be done[a]. Which *preſence* need not always be an actual immediate ſtanding by, within ſight or hearing of the fact; but there may be alſo a conſtructive preſence, as when one commits a robbery or murder, and another keeps watch or guard at ſome convenient diſtance[b]. And this rule hath alſo other exceptions: for, in caſe of murder by poiſoning, a man may be a principal felon, by preparing and laying the poiſon, or perſuading another to drink it[c] who is ignorant of it's poiſonous quality[d], or giving it to him for that purpoſe; and yet not adminiſter it himſelf, nor be preſent when the very deed of poiſoning is committed[e]. And the ſame reaſoning will hold, with regard to other murders committed in the abſence

[a] 1 Hal. P. C. 615.
[b] Foſter. 350.
[c] Kel. 52.
[d] Foſter. 349.
[e] 3 Inſt. 138.

of

of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast, with an intent to do mischief; or exciting a madman to commit murder, so that death thereupon ensues: in every of these cases the party offending is guilty of murder as a principal, in the first degree. For he cannot be called an accessory, that necessarily pre-supposing a principal: and the poison, the pitfall, the beast, or the madman cannot be held principals, being only the instruments of death. As therefore he must be certainly guilty, either as principal or accessory, and cannot be so as accessory, it follows that he must be guilty as principal, and if principal, then in the first degree; for there is no other criminal, much less a superior in the guilt, whom he could aid, abet, or assist [f].

II. AN *accessory* is he who is not the chief actor in the offence, nor present at it's performance, but is someway concerned therein, either *before* or *after* the fact committed. In considering the nature of which degree of guilt, we will, first, examine, what offences admit of accessories, and what not: secondly, who may be an accessory *before* the fact: thirdly, who may be an accessory *after* it: and, lastly, how accessories, considered merely as such, and distinct from principals, are to be treated.

1. AND, first, as to what offences admit of accessories, and what not. In high treason there are no accessories, but all are principals: the same acts, that make a man accessory in felony, making him a principal in high treason, upon account of the heinousness of the crime [g]. Besides it is to be considered, that the bare intent to commit treason is many times actual treason; as imagining the death of the king, or conspiring to take away his crown. And, as no one can advise and abet such a crime without an intention to have it done, there can be no accessories before the fact; since the

[f] 1 Hal. P. C. 617. 2 Hawk. P. C. 315. [g] 3 Inst. 138. 1 Hal. P. C. 613.

very advice and abetment amount to principal treaſon. But this will not hold in the inferior ſpecies of high treaſon, which do not amount to the legal idea of compaſſing the death of the king, queen, or prince. For in thoſe no advice to commit them, unleſs the thing be actually performed, will make a man a principal traitor [h]. In petit treaſon, murder, and felonies with or without benefit of clergy, there may be acceſſories: except only in thoſe offences, which by judgment of law are ſudden and unpremeditated, as manſlaughter and the like; which therefore cannot have any acceſſories *before* the fact [i]. So too in petit larceny, and in all crimes under the degree of felony, there are no acceſſories either *before* or *after* the fact; but all perſons concerned therein, if guilty at all, are principals [k]: the ſame rule holding with regard to the higheſt and loweſt offences; though upon different reaſons. In treaſon all are principals, *propter odium delicti*; in treſpaſs all are principals, becauſe the law, *quae de minimis non curat*, does not deſcend to diſtinguiſh the different ſhades of guilt in petty miſdemeſnors. It is a maxim, that *acceſſorius ſequitur naturam ſui principalis* [l]: and therefore an acceſſory cannot be guilty of a higher crime than his principal; being only puniſhed, as a partaker of his guilt. So that if a ſervant inſtigates a ſtranger to kill his maſter, this being murder in the ſtranger as principal, of courſe the ſervant is acceſſory only to the crime of murder; though, had he been preſent and aſſiſting, he would have been guilty as principal of petty treaſon, and the ſtranger of murder [m].

2. As to the ſecond point, who may be an acceſſory *before* the fact; ſir Matthew Hale [n] defines him to be one, who being abſent at the time of the crime committed, doth yet procure, counſel, or command another to commit a crime. Herein abſence is neceſſary to make him an acceſſory: for if ſuch procurer, or the like, be preſent, he is guilty of the crime as principal. If A then adviſes B to kill another, and

[h] Foſter. 342.
[i] 1 Hal. P. C. 615.
[k] *Ibid.* 613.
[l] 3 Inſt. 139.
[m] 2 Hawk. P. C. 315.
[n] 1 Hal. P. C. 615, 616.

B does

B does it in the abſence of A, now B is principal, and A is acceſſory in the murder. And this holds, even though the party killed be not *in rerum natura* at the time of the advice given. As if A, the reputed father, adviſes B the mother of a baſtard child, unborn, to ſtrangle it when born, and ſhe does ſo; A is acceſſory to this murder [o]. And it is alſo ſettled [p], that whoever procureth a felony to be committed, though it be by the intervention of a third perſon, is an acceſſory before the fact. It is likewiſe a rule, that he who in any wiſe commands or counſels another to commit an unlawful act, is acceſſory to all that enſues upon that unlawful act; but is not acceſſory to any act diſtinct from the other. As if A commands B to beat C, and B beats him ſo that he dies; B is guilty of murder as principal, and A as acceſſory. But if A commands B to burn C's houſe; and he, in ſo doing, commits a robbery; now A, though acceſſory to the burning, is not acceſſory to the robbery, for that is a thing of a diſtinct and unconſequential nature [q]. But if the felony committed be the ſame in ſubſtance with that which is commanded, and only varying in ſome circumſtantial matters; as if, upon a command to poiſon Titius, he is ſtabbed or ſhot, and dies; the commander is ſtill acceſſory to the murder, for the ſubſtance of the thing commanded was the death of Titius, and the manner of it's execution is a mere collateral circumſtance [r].

3. AN acceſſory *after* the fact may be, where a perſon, knowing a felony to have been committed, receives, relieves, comforts, or aſſiſts the felon [s]. Therefore, to make an acceſſory *ex poſt facto*, it is in the firſt place requiſite that he knows of the felony committed [t]. In the next place he muſt receive, relieve, comfort, or aſſiſt him. And, generally, any aſſiſtance whatever given to a felon, to hinder his being apprehended, tried, or ſuffering puniſhment, makes the aſſiſtor an acceſſory. As furniſhing him with a horſe to eſcape his

[o] Dyer. 186.
[p] Foſter. 125.
[q] 1 Hal. P. C. 617.
[r] 2 Hawk. P. C. 316.
[s] 1 Hal. P. C. 618.
[t] 2 Hawk. P. C. 319.

purſuers, money or victuals to ſupport him, a houſe or other ſhelter to conceal him, or open force and violence to reſcue or protect him [t]. So likewiſe to convey inſtruments to a felon to enable him to break gaol, or to bribe the gaoler to let him eſcape, makes a man an acceſſory to the felony. But to relieve a felon in gaol with cloaths or other neceſſaries, is no offence: for the crime imputable to this ſpecies of acceſſory is the hindrance of public juſtice, by aſſiſting the felon to eſcape the vengeance of the law [v]. To buy or receive ſtolen goods, knowing them to be ſtolen, falls under none of theſe deſcriptions; it was therefore at common law a mere miſdemeſnor, and made not the receiver acceſſory to the theft, becauſe he received the *goods* only, and not the *felon* [u]: but now by the ſtatutes 5 Ann. c. 31. and 4 Geo. I. c. 11. all ſuch receivers are made acceſſories (where the principal felony admits of acceſſories [w]), and may be tranſported for fourteen years (1); and, in the caſe of receiving linen goods ſtolen from the bleaching-grounds, are by ſtatute 18 Geo. II. c. 27. declared felons without benefit of clergy. In France ſuch receivers are puniſhed with death: and the Gothic conſtitutions diſtinguiſhed alſo three ſorts of thieves, "*unum* "*qui conſilium daret, alterum qui contrectaret, tertium qui* "*receptaret et occuleret; pari poenae ſingulos obnoxios* [x]."

THE felony muſt be complete at the time of the aſſiſtance given; elſe it makes not the aſſiſtant an acceſſory. As if one wounds another mortally, and after the wound given, but before death enſues, a perſon aſſiſts or receives the delinquent: this does not make him acceſſory to the homicide; for, till death enſues, there is no felony committed [y]. But ſo ſtrict is the law where a felony is actually complete, in order to do effectual juſtice, that the neareſt relations are not ſuffered to aid or receive one another. If the parent aſſiſts his child, or

[t] 2 Hawk. P. C. 317, 318.
[v] 1 Hal. P. C 620, 621.
[u] *Ibid.* 620.
[w] Foſter. 73.
[x] Stiernhook *de jure Goth. l.* 3. *c.* 5.
[y] 2 Hawk. P. C. 320.

(1) See more upon this ſubject in p. 132.

the

the child the parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessories *ex post facto*[z]. But [39] a feme covert cannot become an accessory by the receipt and concealment of her husband; for she is presumed to act under his coërcion, and therefore she is not bound, neither ought she, to discover her lord[a].

4. The last point of enquiry is, how accessories are to be treated, considered distinct from principals. And the general rule of the antient law (borrowed from the Gothic constitutions[b]) is this, that accessories shall suffer the same punishment as their principals: if one be liable to death, the other is also liable[c]: as, by the laws of Athens, delinquents and their abettors were to receive the same punishment[d]. Why then, it may be asked, are such elaborate distinctions made between accessories and principals, if both are to suffer the same punishment? For these reasons: 1. To distinguish the nature and denomination of crimes, that the accused may know how to defend himself when indicted: the commission of an actual robbery being quite a different accusation from that of harbouring the robber. 2. Because, though by the antient common law the rule is as before laid down, that both shall be punished alike, yet now by the statutes relating to the benefit of clergy a distinction is made between them: accessories *after* the fact being still allowed the benefit of clergy in all cases, except horse-stealing[e] and stealing of linen from bleaching-grounds[f]: which is denied to the principals, and accessories *before* the fact, in many cases; as, among others, in petit treason, murder, robbery, and wilful burning[g]. And perhaps if a distinction were constantly to be made between the punishment of principals and accessories, even *before* the fact, the latter to be treated with a

[z] 3 Inst. 108. 2 Hawk. P. C. 320.
[a] 1 Hal. P. C. 621.
[b] See Stiernhook, *ibid.*
[c] 3 Inst. 188.
[d] Pott. Antiq. b. 1. c. 26.
[e] Stat. 31 Eliz. c. 12.
[f] Stat. 18 Geo. II. c. 27.
[g] 1 Hal. P. C. 615.

little

little leſs ſeverity than the former, it might prevent the perpetration of many crimes, by increaſing the difficulty of finding a perſon to execute the deed itſelf; as his danger would
[40] be greater than that of his accomplices, by reaſon of the difference of his puniſhment [h]. 3. Becauſe formerly no man could be tried as acceſſory till after the principal was convicted, or at leaſt he muſt have been tried at the ſame time with him: though that law is now much altered, as will be ſhewn more fully in it's proper place. 4. Becauſe, though a man be indicted as acceſſory and acquitted, he may afterwards be indicted as principal: for an acquittal of receiving or counſelling a felon, is no acquittal of the felony itſelf: but it is matter of ſome doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as acceſſory before the fact; ſince thoſe offences are frequently very near allied, and therefore an acquittal of the guilt of one may be an acquittal of the other alſo [i]. But it is clearly held, that one acquitted as principal may be indicted as an acceſſory *after* the fact; ſince that is always an offence of a different ſpecies of guilt, principally tending to evade the public juſtice, and is ſubſequent in it's commencement to the other. Upon theſe reaſons the diſtinction of principal and acceſſory will appear to be highly neceſſary; though the puniſhment is ſtill much the ſame with regard to principals, and ſuch acceſſories as offend *before* the fact is committed.

[h] Beccar. c. 37. [i] 1 Hal. P. C. 625, 626. 2 Hawk. P. C. 373. Foſter. 361.

CHAPTER THE FOURTH.

OF OFFENCES AGAINST GOD AND RELIGION.

IN the preſent chapter we are to enter upon the detail of the ſeveral ſpecies of crimes and miſdemeſnors, with the puniſhments annexed to each by the laws of England. It was obſerved in the beginning of this book[a], that crimes and miſdemeſnors are a breach and violation of the public rights and duties, owing to the whole community, conſidered as a community, in it's ſocial aggregate capacity. And in the very entrance of theſe commentaries[b] it was ſhewn, that human laws can have no concern with any but ſocial and relative duties; being intended only to regulate the conduct of man, conſidered under various relations, as a member of civil ſociety. All crimes ought therefore to be eſtimated merely according to the miſchiefs which they produce in civil ſociety[c]: and, of conſequence, private vices, or breach of mere abſolute duties, which man is bound to perform, conſidered only as an individual, are not, cannot be, the object of any municipal law, any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a ſpecies of public crimes. Thus the vice of drunkenneſs, if committed privately and alone, is beyond the knowlege, and of courſe beyond the reach of human tribunals: but if committed publicly, in the face of the world, it's evil example makes it liable to temporal cenſures. The vice of lying, which conſiſts (abſtractedly taken) in a criminal violation of truth, and therefore in any

[a] See pag. 5. [b] See Vol. I. pag. 123, 124. [c] Beccar. ch. 8.

ſhape

ſhape is derogatory from ſound morality, is not however taken notice of by our law, unleſs it carries with it ſome public inconvenience, as ſpreading falſe news; or ſome ſocial injury, as ſlander and malicious proſecution, for which a private recompence is given. And yet drunkenneſs and malevolent lying are *in foro conſcientiae* as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are ſubject to the vengeance of eternal juſtice; and public vices are beſides liable to the temporal puniſhments of human tribunals.

ON the other hand, there are ſome miſdemeſnors, which are puniſhed by the municipal law, that have in themſelves nothing criminal, but are made unlawful by the poſitive conſtitutions of the ſtate for public convenience; ſuch as poaching, exportation of wool, and the like. Theſe are naturally no offences at all; but their whole criminality conſiſts in their diſobedience to the ſupreme power, which has an undoubted right, for the well-being and peace of the community, to make ſome things unlawful, which are in themſelves indifferent. Upon the whole, therefore, though part of the offences to be enumerated in the following ſheets are offences againſt the revealed law of God, others againſt the law of nature, and ſome are offences againſt neither; yet in a treatiſe of municipal law we muſt conſider them all as deriving their particular guilt, here puniſhable, from the law of man.

HAVING premiſed this caution, I ſhall next proceed to diſtribute the ſeveral offences, which are either directly or by conſequence injurious to civil ſociety, and therefore puniſhable by the laws of England, under the following general heads: firſt, thoſe which are more immediately injurious to God and his holy religion; ſecondly, ſuch as violate and tranſgreſs the law of nations; thirdly, ſuch as more eſpecially affect the ſovereign executive power of the ſtate, or the king and his government; fourthly, ſuch as more directly infringe

infringe the rights of the public or commonwealth; and, laſtly, ſuch as derogate from thoſe rights and duties, which are owing to particular individuals, and in the preſervation and vindication of which the community is deeply intereſted.

FIRST then, of ſuch crimes and miſdemeſnors, as more immediately offend Almighty God, by openly tranſgreſſing the precepts of religion either natural or revealed; and mediately by their bad example and conſequence, the law of ſociety alſo; which conſtitutes that guilt in the action, which human tribunals are to cenſure.

I. OF this ſpecies the firſt is that of *apoſtacy*, or a total renunciation of chriſtianity, by embracing either a falſe religion, or no religion at all. This offence can only take place in ſuch as have once profeſſed the true religion. The perverſion of a chriſtian to judaiſm, paganiſm, or other falſe religion, was puniſhed by the emperors Conſtantius and Julian with confiſcation of goods [d]; to which the emperors Theodoſius and Valentinian added capital puniſhment, in caſe the apoſtate endeavoured to pervert others to the ſame iniquity [e]. A puniſhment too ſevere for any temporal laws to inflict upon any ſpiritual offence: and yet the zeal of our anceſtors imported it into this country; for we find by Bracton [f], that in his time apoſtates were to be burnt to death. Doubtleſs the preſervation of chriſtianity, as a national religion, is, abſtracted from it's own intrinſic truth, of the utmoſt conſequence to the civil ſtate: which a ſingle inſtance will ſufficiently demonſtrate. The belief of a future ſtate of rewards and puniſhments, the entertaining juſt ideas of the moral attributes of the ſupreme Being, and a firm perſuaſion that he ſuperintends and will finally compenſate every action in human life, (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our ſaviour Chriſt,) theſe are the grand foundation of all judicial oaths; which call God to witneſs the truth of thoſe facts, which perhaps may be only known to him and the party atteſting: all moral evidence

[d] Cod. 1. 7. 1. [e] *Ibid.* 6. [f] *l.* 3. *c.* 9.

therefore,

therefore, all confidence in human veracity, must be weakened by apostacy, and overthrown by total infidelity[g]. Wherefore all affronts to christianity, or endeavours to depreciate it's efficacy, in those who have once professed it, are highly deserving of censure. But yet the loss of life is a heavier penalty than the offence, taken in a civil light, deserves: and, taken in a spiritual light, our laws have no jurisdiction over it. This punishment therefore has long ago become obsolete; and the offence of apostacy was for a long time the object only of the ecclesiastical courts, which corrected the offender *pro salute animae*. But about the close of the last century, the civil liberties to which we were then restored being used as a cloke of maliciousness, and the most horrid doctrines subversive of all religion being publicly avowed both in discourse and writings, it was thought necessary again for the civil power to interpose, by not admitting those miscreants[h] to the privileges of society, who maintained such principles as destroyed all moral obligation. To this end it was enacted by statute 9 & 10 W. III. c. 32. that if any person educated in, or having made profession of, the christian religion, shall, by writing, printing, teaching, or advised speaking, deny the christian religion to be true, or the holy scriptures to be of divine authority, he shall upon the first offence be rendered incapable to hold any office or place of trust; and, for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchasor of lands, and shall suffer three years imprisonment without bail. To give room however for repentance, if, within four months after the first conviction, the delinquent will in open court publicly renounce his error, he is discharged for that once from all disabilities.

II. A SECOND offence is that of *heresy*, which consists not in a total denial of christianity, but of some of it's essential

[g] *Utiles esse opiniones has, quis negat, cum intelligat, quam multa firmentur jurejurando; quantae salutis sint foederum religiones; quam multos divini supplicii metus a scelere revocarit; quamque sancta sit societas civium inter ipsos, Diis immortalibus interpositis tum judicibus tum testibus? Cic. de LL.* ii. 7.

[h] *Mescroyantz* in our antient law books is the name of unbelievers.

doctrines,

doctrines, publicly and obstinately avowed; being defined by sir Matthew Hale, "*sententia rerum divinarum humano sensu excogitata, palam docta et pertinaciter defensa*[i]." And here it must also be acknowleged that particular modes of belief or unbelief, not tending to overturn christianity itself, or to sap the foundations of morality, are by no means the object of coërcion by the civil magistrate. What doctrines shall therefore be adjudged heresy, was left by our old constitution to the determination of the ecclesiastical judge; who had herein a most arbitrary latitude allowed him. For the general definition of an heretic given by Lyndewode[k], extends to the smallest deviations from the doctrines of holy church, "*haereticus est qui dubitat de fide catholica, et qui negligit servare ea, quae Romana ecclesia statuit, seu servare decreverat.*" Or, as the statute 2 Hen. IV. c. 15. expresses it in English, "teachers of erroneous opinions, contrary to the faith and "blessed determinations of the holy church." Very contrary this to the usage of the first general councils, which defined all heretical doctrines with the utmost precision and exactness. And what ought to have alleviated the punishment, the uncertainty of the crime, seems to have enhanced it in those days of blind zeal and pious cruelty. It is true that the sanctimonious hypocrisy of the canonists went at first no farther than enjoining penance, excommunication, and ecclesiastical deprivation, for heresy; though afterwards they proceeded boldly to imprisonment by the ordinary, and confiscation of goods *in pios usus*. But in the mean time they had prevailed upon the weakness of bigotted princes, to make the civil power subservient to their purposes, by making heresy not only a temporal, but even a capital offence: the Romish ecclesiastics determining, without appeal, whatever they pleased to be heresy, and shifting off to the secular arm the odium and drudgery of executions; with which they themselves were too tender and delicate to intermeddle. Nay, they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum sententia circa eum moderatur*[l]: well knowing at the same time that they were delivering the un-

[i] 1 Hal. P. C. 384. [k] *cap. de haereticis.* [l] *Decretal. l. 5. t. 40. c. 27.*

happy victim to certain death. Hence the capital punishments inflicted on the antient Donatists and Manichaeans by the emperors Theodosius and Justinian [m]: hence also the constitution of the emperor Frederic mentioned by Lyndewode [n], adjudging all persons without distinction to be burnt with fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution [o], ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good catholics to seize and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy see, and the just punishment of the royal bigot: for upon the authority of this very constitution, the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou [p].

CHRISTIANITY being thus deformed by the daemon of persecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our antient precedents [q] a writ *de haeretico comburendo*, which is thought by some to be as antient as the common law itself. However it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the king to do as he should please with him: so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ *de haeretico comburendo* being not a writ of course, but issuing only by the special direction of the king in council [r].

[m] *Cod. l.* 1. *tit.* 5.
[n] *c. de haereticis.*
[o] *Cod.* 1. 5. 4.
[p] Baldus *in Cod.* 1. 5. 4.
[q] F. N. B. 269.
[r] 1 Hal. P. C. 395.

BUT in the reign of Henry the fourth, when the eyes of the chriſtian world began to open, and the ſeeds of the proteſtant religion (though under the opprobrious name of lollardy [s]) took root in this kingdom; the clergy taking advantage from the king's dubious title to demand an increaſe of their own power, obtained an act of parliament [t], which ſharpened the edge of perſecution to it's utmoſt keenneſs. For, by that ſtatute, the dioceſan alone, without the intervention of a ſynod, might convict of heretical tenets; and unleſs the convict abjured his opinions, or if after abjuration he relapſed, the ſheriff was bound *ex officio*, if required by the biſhop, to commit the unhappy victim to the flames, without waiting for the conſent of the crown. By the ſtatute 2 Hen. V. c. 7. lollardy was alſo made a temporal offence, and indictable in the king's courts; which did not thereby gain an excluſive, but only a concurrent juriſdiction with the biſhop's conſiſtory.

AFTERWARDS, when the final reformation of religion began to advance, the power of the eccleſiaſtics was ſomewhat moderated: for though what hereſy *is*, was not then preciſely defined, yet we are told in ſome points what it is *not*: the ſtatute 25 Hen. VIII. c. 14. declaring, that offences againſt the ſee of Rome are not hereſy; and the ordinary being thereby reſtrained from proceeding in any caſe upon mere ſuſpicion; that is, unleſs the party be accuſed by two credible witneſſes, or an indictment of hereſy be firſt previouſly found in the king's courts of common law. And yet the ſpirit of perſecution was not then abated, but only diverted into a lay channel. For in ſix years afterwards, by ſtatute 31 Hen. VIII. c. 14. the bloody law of the ſix articles was made, which eſtabliſhed the ſix moſt conteſted points of popery, tranſubſtantiation, communion in one kind, the celibacy of the clergy, monaſtic vows, the ſacrifice of the maſs, and auricular confeſſion; which points were "determined and reſolved by

[s] So called not from *lolium*, or tares (an etymology, which was afterwards deviſed in order to juſtify the *burning* of them; Matth. xiii. 30.) but from one Walter Lolhard, a German reformer, A. D. 1315. Mod. Un. Hiſt. xxvi. 13. Spelm. *Gloſſ.* 371.

[t] 2 Hen. IV. c. 15.

" the moſt godly ſtudy, pain, and travail of his majeſty: for " which his moſt humble and obedient ſubjects, the lords " *ſpiritual* and temporal, and the commons, in parliament " aſſembled, did not only render and give unto his highneſs " their moſt high and hearty thanks," but did alſo enact and declare all oppugners of the firſt to be heretics, and to be burnt with fire; and of the five laſt to be felons, and to ſuffer death. The ſame ſtatute eſtabliſhed a new and mixed juriſdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on deſtroying the ſupremacy of the biſhops of Rome, and eſtabliſhing all other their corruptions of the chriſtian religion.

I SHALL not perplex this detail with the various repeals and revivals of theſe ſanguinary laws in the two ſucceeding reigns; but ſhall proceed directly to the reign of queen Elizabeth; when the reformation was finally eſtabliſhed with temper and decency, unſullied with party rancour, or perſonal caprice and reſentment. By ſtatute 1 Eliz. c. 1. all former ſtatutes relating to hereſy are repealed, which leaves the juriſdiction of hereſy as it ſtood at common law; *viz.* as to the infliction of common cenſures, in the eccleſiaſtical courts; and in caſe of burning the heretic, in the provincial ſynod only [v]. Sir Matthew Hale is indeed of a different opinion, and holds that ſuch power reſided in the dioceſan alſo, though he agrees, that in either caſe the writ *de haeretico comburendo* was not demandable of common right, but grantable or otherwiſe merely at the king's diſcretion [u]. But the principal point now gained was, that by this ſtatute a boundary is for the firſt time ſet to what ſhall be accounted hereſy; nothing for the future being to be ſo determined, but only ſuch tenets, which have been heretofore ſo declared, 1. By the words of the canonical ſcriptures: 2. By the firſt four general councils, or ſuch others as have only uſed the words of the holy ſcriptures; or, 3. Which ſhall hereafter be ſo declared by the parliament, with the aſſent of the clergy in convocation. Thus was hereſy reduced to a greater certainty than before; though it might not have been the worſe to have defined it in terms ſtill

[v] 5 Rep. 23. 12 Rep. 56. 92. [u] 1 Hal. P. C. 405.

more

more precise and particular: as a man continued still liable to be burnt, for what perhaps he did not understand to be heresy, till the ecclesiastical judge so interpreted the words of the canonical scriptures. [49]

FOR the writ *de haeretico comburendo* remained still in force; and we have instances of it's being put in execution upon two Anabaptists in the seventeenth of Elizabeth, and two Arians in the ninth of James the first. But it was totally abolished, and heresy again subjected only to ecclesiastical correction *pro salute animae*, by virtue of the statute 29 Car. II. c. 9. For in one and the same reign, our lands were delivered from the slavery of military tenures; our bodies from arbitrary imprisonment by the *habeas corpus* act; and our minds from the tyranny of superstitious bigotry, by demolishing this last badge of persecution in the English law.

IN what I have now said I would not be understood to derogate from the just rights of the national church, or to favour a loose latitude of propagating any crude undigested sentiments in religious matters. Of propagating, I say; for the bare entertaining them, without an endeavour to diffuse them, seem hardly cognizable by any human authority. I only mean to illustrate the excellence of our present establishment, by looking back to former times. Every thing is now as it should be, with respect to the spiritual cognizance, and spiritual punishment, of heresy: unless perhaps that the crime ought to be more strictly defined, and no prosecution permitted, even in the ecclesiastical courts, till the tenets in question are by proper authority previously declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics; yet not to harass them with temporal penalties, much less to exterminate or destroy them. The legislature hath indeed thought it proper, that the civil magistrate should again interpose, with regard to one species of heresy, very prevalent in modern times; for by statute 9 & 10 W. III. c. 32. if any person educated in

the chriſtian religion, or profeſſing the ſame, ſhall by writing, printing, teaching, or adviſed ſpeaking, deny any one of the perſons of the holy trinity to be God, or maintain that
[50] there are more Gods than one, he ſhall undergo the ſame penalties and incapacities, which were juſt now mentioned to be inflicted on apoſtacy by the ſame ſtatute. And thus much for the crime of hereſy.

III. ANOTHER ſpecies of offences againſt religion are thoſe which affect the *eſtabliſhed church*. And theſe are either poſitive, or negative: poſitive, by reviling it's ordinances; or negative, by non-conformity to it's worſhip. Of both of theſe in their order.

1. AND, firſt, of the offence of *reviling the ordinances* of the church. This is a crime of a much groſſer nature than the other of mere non-conformity; ſince it carries with it the utmoſt indecency, arrogance, and ingratitude: indecency, by ſetting up private judgment in virulent and factious oppoſition to public authority: arrogance, by treating with contempt and rudeneſs what has at leaſt a better chance to be right than the ſingular notions of any particular man; and ingratitude, by denying that indulgence and undiſturbed liberty of conſcience to the members of the national church, which the retainers to every petty conventicle enjoy. However it is provided by ſtatutes 1 Edw. VI. c. 1. and 1 Eliz. c. 1. that whoever reviles the ſacrament of the lord's ſupper ſhall be puniſhed by fine and impriſonment: and by the ſtatute 1 Eliz. c. 2. if any miniſter ſhall ſpeak any thing in derogation of the book of common prayer, he ſhall, if not beneficed, be impriſoned one year for the firſt offence, and for life for the ſecond: and, if he be beneficed, he ſhall for the firſt offence be impriſoned ſix months, and forfeit a year's value of his benefice: for the ſecond offence he ſhall be deprived, and ſuffer one year's impriſonment; and, for the third, ſhall in like manner be deprived, and ſuffer impriſonment for life. And if *any perſon* whatſoever ſhall in plays, ſongs, or other open words, ſpeak any thing in derogation, depraving, or

deſpiſing

deſpiſing of the ſaid book, or ſhall forcibly prevent the reading of it, or cauſe any other ſervice to be uſed in it's ſtead, he ſhall forfeit for the firſt offence an hundred marks; for the ſecond, four hundred; and for the third, ſhall forfeit all his goods and chattels, and ſuffer impriſonment for life. Theſe penalties were framed in the infancy of our preſent eſtabliſhment: when the diſciples of Rome and of Geneva united in inveighing with the utmoſt bitterneſs againſt the Engliſh liturgy: and the terror of theſe laws (for they ſeldom, if ever, were fully executed) proved a principal means, under providence, of preſerving the purity as well as decency of our national worſhip. Nor can their continuance to this time (of the milder penalties at leaſt) be thought too ſevere and intolerant; ſo far as they are levelled at the offence, not of *thinking* differently from the national church, but of *railing* at that church and *obſtructing* it's ordinances, for not ſubmitting it's public judgment to the private opinion of others. For, though it is clear that no reſtraint ſhould be laid upon rational and diſpaſſionate diſcuſſions of the rectitude and propriety of the eſtabliſhed mode of worſhip; yet contumely and contempt are what no eſtabliſhment can tolerate [v]. A rigid attachment to trifles, and an intemperate zeal for reforming them, are equally ridiculous and abſurd; but the latter is at preſent the leſs excuſable, becauſe from political reaſons, ſufficiently hinted at in a former volume [w], it would now be extremely unadviſable to make any alterations in the ſervice of the church; unleſs by it's own conſent, or unleſs it can be ſhewn that ſome manifeſt impiety or ſhocking abſurdity will follow from continuing the preſent forms. [51]

2. NON-CONFORMITY to the worſhip of the church is the other, or negative branch of this offence. And for this there is much more to be pleaded than for the former; being a mat-

[v] By an ordinance 23 Aug. 1645, which continued till the reſtoration, to preach, write, or print, any thing in derogation or depraving of the *directory*, for the then eſtabliſhed preſbyterian worſhip, ſubjected the offender upon indictment to a diſcretionary fine, not exceeding fifty pounds. (Scobell. 98.)

[w] Vol. I. pag. 98.

ter of private conſcience, to the ſcruples of which our preſent laws have ſhewn a very juſt and chriſtian indulgence. For undoubtedly all perſecution and oppreſſion of weak conſciences, on the ſcore of religious perſuaſions, are highly unjuſtifiable upon every principle of natural reaſon, civil liberty, or ſound religion. But care muſt be taken not to carry this indulgence into ſuch extremes, as may endanger
[52] the national church: there is always a difference to be made between toleration and eſtabliſhment.

NON-CONFORMISTS are of two ſorts: firſt, ſuch as abſent themſelves from divine worſhip in the eſtabliſhed church, through total irreligion, and attend the ſervice of no other perſuaſion. Theſe by the ſtatutes of 1 Eliz. c. 2. 23 Eliz. c. 1. and 3 Jac. I. c. 4. forfeit one ſhilling to the poor every lord's day they ſo abſent themſelves, and 20 *l.* to the king if they continue ſuch default for a month together. And if they keep any inmate, thus irreligiouſly diſpoſed, in their houſes, they forfeit 10 *l. per* month.

THE ſecond ſpecies of non-conformiſts are thoſe who offend through a miſtaken or perverſe zeal. Such were eſteemed by our laws, enacted ſince the time of the reformation, to be papiſts and proteſtant diſſenters: both of which were ſuppoſed to be equally ſchiſmatics in not communicating with the national church; with this difference, that the papiſts divided from it upon material, though erroneous, reaſons; but many of the diſſenters upon matters of indifference, or, in other words, upon no reaſon at all. Yet certainly our anceſtors were miſtaken in their plans of compulſion and intolerance. The ſin of ſchiſm, as ſuch, is by no means the object of temporal coërcion and puniſhment. If through weakneſs of intellect, through miſdirected piety, through perverſeneſs and acerbity of temper, or (which is often the caſe) through a proſpect of ſecular advantage in herding with a party, men quarrel with the eccleſiaſtical eſtabliſhment, the civil magiſtrate has nothing to do with it; unleſs their tenets and practice are ſuch as threaten ruin or diſturbance to the ſtate. He is bound indeed to protect the eſtabliſhed church;

and,

and, if this can be better effected, by admitting none but it's genuine members to offices of truſt and emolument, he is certainly at liberty ſo to do; the diſpoſal of offices being matter of favour and diſcretion. But, this point being once ſecured, all perſecution for diverſity of opinions, however ridiculous or abſurd they may be, is contrary to every principle of ſound policy and civil freedom. The names and ſubordination of the clergy, the poſture of devotion, the materials and colour of the miniſter's garment, the joining in a known or an unknown form of prayer, and other matters of the ſame kind, muſt be left to the option of every man's private judgment. [53]

WITH regard therefore to *proteſtant diſſenters*, although the experience of their turbulent diſpoſition in former times occaſioned ſeveral diſabilities and reſtrictions (which I ſhall not undertake to juſtify) to be laid upon them by abundance of ſtatutes [x], yet at length the legiſlature, with a ſpirit of true magnanimity, extended that indulgence to theſe ſectaries, which they themſelves, when in power, had held to be countenancing ſchiſm, and denied to the church of England [y]. The penalties are conditionally ſuſpended by the ſtatute 1 W. & M. ſt. 1. c. 18. "for exempting their majeſties' proteſtant "ſubjects, diſſenting from the church of England, from the "penalties of certain laws," commonly called the toleration act; which is confirmed by ſtatute 10 Ann. c. 2. and declares that neither the laws above-mentioned, nor the ſtatutes 1 Eliz. c. 2. § 14. 3 Jac I. c. 4 & 5. nor any other penal laws made againſt popiſh recuſants (except the teſt acts) ſhall extend to any diſſenters, other than papiſts and ſuch as deny the trinity: provided, 1. that they take the oaths of allegiance and ſupremacy (or make a ſimilar affirmation, being quakers [z]) and ſubſcribe the declaration againſt popery; 2. that they repair to ſome congregation certified to and regiſtered in the court of the biſhop or archdeacon, or at the

[x] 23 Eliz. c. 1. 29 Eliz. c. 6. 35 Eliz. c. 1. 22 Car. II. c. 1.

[y] The ordinance of 1645 (before-cited) inflicted impriſonment for a year on the third offence, and pecuniary penalties on the former two, in caſe of uſing the book of common-prayer not only in a place of public worſhip, but alſo in any private family.

[z] See ſtat. 8 Geo. I. c. 6.

county seſſions; 3. that the doors of ſuch meeting-houſe ſhall be unlocked, unbarred, and unbolted; in default of which the perſons meeting there are ſtill liable to all the penalties of the former acts. Diſſenting teachers, in order to be exempted from the penalties of the ſtatutes 13 & 14 Car. II. c. 4. 15 Car. II. c. 6. 17 Car. II. c. 2. and 22 Car. II. c. 1. are alſo to ſubſcribe the articles of religion mentioned in the ſtatute 13 Eliz. c. 12. (which only concern the confeſſion of the true chriſtian faith, and the doctrine of the ſacraments) with an expreſs exception of thoſe relating to the government
[54] and powers of the church, and to infant baptiſm; or if they ſcruple ſubſcribing the ſame, ſhall make and ſubſcribe the declaration preſcribed by ſtatute 19 Geo. III. c. 44. profeſſing themſelves to be chriſtians and proteſtants, and that they believe the ſcriptures to contain the revealed will of God, and to be the rule of doctrine and practice. Thus, though the crime of non-conformity is by no means univerſally abrogated, it is ſuſpended and ceaſes to exiſt with regard to theſe proteſtant diſſenters, during their compliance with the conditions impoſed by theſe acts: and, under theſe conditions, all perſons, who will approve themſelves no papiſts or oppugners of the trinity, are left at full liberty to act as their conſciences ſhall direct them, in the matter of religious worſhip. And if any perſon ſhall wilfully, maliciouſly, or contemptuouſly diſturb any congregation, aſſembled in any church or permitted meeting-houſe, or ſhall miſuſe any preacher or teacher there, he ſhall (by virtue of the ſame ſtatute 1 W. & M.) be bound over to the ſeſſions of the peace, and forfeit twenty pounds. But by ſtatute 5 Geo. I. c. 4. no mayor or principal magiſtrate, muſt appear at any diſſenting meeting with the enſigns of his office[a], on pain of diſability to hold that or any other office: the legiſlature judging it a matter of propriety, that a mode of worſhip, ſet up in oppoſition to the national, when allowed to be exerciſed in peace, ſhould be exerciſed

[a] Sir Humphry Edwin, a lord mayor of London, had the imprudence ſoon after the toleration act to go to a preſbyterian meeting-houſe in his formalities; which is alluded to by dean Swift, in his *tale of a tub*, under the allegory of *Jack* getting on a great horſe, and eating cuſtard.

alſo

alſo with decency, gratitude, and humility. Diſſenters alſo, who ſubſcribe the declaration of the act 19 Geo. III. are exempted (unleſs in the caſe of endowed ſchools, and colleges) from the penalties of the ſtatutes 13 & 14 Car. II. c. 4. & 17 Car. II. c. 2. which prohibit (upon pain of fine and impriſonment) all perſons from teaching ſchool unleſs they be licenſed by the ordinary, and ſubſcribe a declaration of conformity to the liturgy of the church, and reverently frequent divine ſervice *eſtabliſhed* by the laws of this kingdom.

As to *papiſts*, what has been ſaid of the proteſtant diſſenters would hold equally ſtrong for a general toleration of them; provided their ſeparation was founded only upon difference of [55] opinion in religion, and their principles did not alſo extend to a ſubverſion of the civil government. If once they could be brought to renounce the ſupremacy of the pope, they might quietly enjoy their ſeven ſacraments, their purgatory, and auricular confeſſion; their worſhip of reliques and images; nay, even their tranſubſtantiation. But while they acknowlege a foreign power, ſuperior to the ſovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good ſubjects.

LET us therefore now take a view of the laws in force againſt the papiſts; who may be divided into three claſſes, perſons profeſſing popery, popiſh recuſants convict, and popiſh prieſts. 1. Perſons profeſſing the popiſh religion, beſides the former penalties for not frequenting their pariſh church, are diſabled from taking their lands either by deſcent or purchaſe, after eighteen years of age, until they renounce their errors: they muſt at the age of twenty-one regiſter their eſtates before acquired, and all future conveyances and wills relating to them; they are incapable of preſenting to any advowſon, or granting to any other perſon any avoidance of the ſame; they may not keep or teach any ſchool under pain of perpetual impriſonment; and, if they willingly ſay or hear maſs, they forfeit the one two hundred, the other one hundred marks, and each ſhall ſuffer a year's impriſonment. Thus much for perſons, who, from the misfortune of family prejudices or otherwiſe,

wife, have conceived an unhappy attachment to the Romish church from their infancy, and publicly profess it's errors. But if any evil industry is used to rivet these errors upon them, if any person sends another abroad to be educated in the popish religion, or to reside in any religious house abroad for that purpose, or contributes to their maintenance when there; both the sender, the sent, and the contributor, are disabled to sue in law or equity, to be executor or administrator to any person, to take any legacy or deed of gift, and to bear any office in the realm, and shall forfeit all their goods and chattels, and likewise all their real estate for life. And where these errors are also aggravated by apostacy, or perversion, where a person is reconciled to the see of Rome, or procures others to
[56] be reconciled, the offence amounts to high treason. 2. Popish recusants, convicted in a court of law of not attending the service of the church of England, are subject to the following disabilities, penalties, and forfeitures, over and above those before-mentioned. They are considered as persons excommunicated; they can hold no office or employment; they must not keep arms in their houses, but the same may be seized by the justices of the peace; they may not come within ten miles of London, on pain of 100*l*; they can bring no action at law, or suit in equity; they are not permitted to travel above five miles from home, unless by licence, upon pain of forfeiting all their goods; and they may not come to court under pain of 100*l*. No marriage or burial of such recusant, or baptism of his child, shall be had otherwise than by the ministers of the church of England, under other severe penalties. A married woman, when recusant, shall forfeit two-thirds of her dower or jointure, may not be executrix or administratrix to her husband, nor have any part of his goods; and during the coverture may be kept in prison, unless her husband redeems her at the rate of 10*l*. a month, or the third part of all his lands. And lastly, as a feme-covert recusant may be imprisoned, so all others must, within three months after conviction, either submit and renounce their errors, or, if required so to do by four justices, must abjure and renounce the realm: and if they do not depart, or if they return without the king's licence, they shall be guilty of felony, and

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ſuffer death as felons without benefit of clergy. There is alſo an inferior ſpecies of recuſancy, (refuſing to make the declaration againſt popery, enjoined by ſtatute 30 Car. II. ſt. 2. when tendered by the proper magiſtrate,) which, if the party reſides within ten miles of London, makes him an abſolute recuſant convict; or, if at a greater diſtance, ſuſpends him from having any ſeat in parliament, keeping arms in his houſe, or any horſe above the value of five pounds. This is the ſtate, by the laws now in being[b], of a lay papiſt. But, 3. The remaining ſpecies or degree, *viz.* popiſh prieſts, [57] are in a ſtill more dangerous condition. For by ſtatute 11 and 12 W. III. c. 4. popiſh prieſts or biſhops, celebrating maſs, or exerciſing any part of their functions in England, except in the houſes of embaſſadors, are liable to perpetual impriſonment. And by the ſtatute 27 Eliz. c. 2. any popiſh prieſt, born in the dominions of the crown of England, who ſhall come over hither from beyond ſea, (unleſs driven by ſtreſs of weather, and tarrying only a reaſonable time[c],) or ſhall be in England three days without conforming and taking the oaths, is guilty of high treaſon: and all perſons harbouring him are guilty of felony without the benefit of clergy.

THIS is a ſhort ſummary of the laws againſt the papiſts, under their three ſeveral claſſes, of perſons profeſſing the popiſh religion, popiſh recuſants convict, and popiſh prieſts. Of which the preſident Monteſquieu obſerves[d], that they are ſo rigorous, though not profeſſedly of the ſanguinary kind, that they do all the hurt that can poſſibly be done in cold blood. But in anſwer to this it may be obſerved, (what foreigners who only judge from our ſtatute book are not fully apprized of,) that theſe laws are ſeldom exerted to their utmoſt rigor: and indeed, if they were, it would be very difficult to excuſe them. For they are rather to be accounted for from their hiſtory, and the urgency of the times which produced

[b] Stat. 23 Eliz. c. 1. 27 Eliz. c. 2. 29 Eliz. c. 6. 35 Eliz. c. 2. 1 Jac. I. c. 4. 3 Jac. I. c. 4. & 5. 7 Jac. I. c. 6. 3 Car. I. c. 3. 25 Car. II. c. 2. 30 Car. II. ſt. 2. 1 W. & M. c. 9. 15. & 26. 11 & 12 W. III. c. 4. 12 Ann. ſt. 2. c. 14. 1 Geo. I. ſt. 2. c. 55. 3 Geo. I. c. 18. 11 Geo. II. c. 17.

[c] Raym. 377. Latch. 1.

[d] Sp. L. b. 19. c. 27.

them, than to be approved (upon a cool review) as a ſtanding ſyſtem of law. The reſtleſs machinations of the Jeſuits during the reign of Elizabeth, the turbulence and uneaſineſs of the papiſts under the new religious eſtabliſhment, and the boldneſs of their hopes and wiſhes for the ſucceſſion of the queen of Scots, obliged the parliament to counteract ſo dangerous a ſpirit by laws of a great, and then perhaps neceſſary, ſeverity. The powder-treaſon, in the ſucceeding reign, ſtruck a panic into James I. which operated in different ways: it occaſioned the enacting of new laws againſt the papiſts; but deterred him from putting them in execution. The intrigues of queen Henrietta in the reign of Charles I., the proſpect of a popiſh ſucceſſor in that of Charles II., the aſſaſſination-plot in the reign of king William, and the avowed claim of a popiſh pretender to the crown in that and ſubſequent reigns, will
[58] account for the extenſion of theſe penalties at thoſe ſeveral periods of our hiſtory. But if a time ſhould ever arrive, and perhaps it is not very diſtant, when all fears of a pretender ſhall have vaniſhed, and the power and influence of the pope ſhall become feeble, ridiculous, and deſpicable, not only in England, but in every kingdom of Europe; it probably would not then be amiſs to review and ſoften theſe rigorous edicts; at leaſt till the *civil* principles of the roman catholics called again upon the legiſlature to renew them: for it ought not to be left in the breaſt of every mercileſs bigot, to drag down the vengeance of theſe occaſional laws upon inoffenſive, though miſtaken ſubjects; in oppoſition to the lenient inclinations of the civil magiſtrate, and to the deſtruction of every principle of toleration and religious liberty.

THIS hath partly been done by ſtatute 18 Geo. III. c. 60. with regard to ſuch papiſts as duly take the oath therein preſcribed, of allegiance to his majeſty, abjuration of the pretender, renunciation of the pope's civil power, and abhorrence of the doctrines of deſtroying and not keeping faith with heretics, and depoſing or murdering princes excommunicated by authority of the ſee of Rome: in reſpect of whom only the ſtatute of 11 & 12 W. III. is repealed, ſo far as it

disables them from purchasing or inheriting, or authorizes the apprehending or prosecuting the popish clergy, or subjects to perpetual imprisonment either them or any teachers of youth (1).

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(1) But now by the statute 31 Geo. III. c. 32., which may be called the toleration act of the roman catholics, all the severe and cruel restrictions and penalties, enumerated by the learned Judge, are removed from those roman catholics, who are willing to comply with the requisitions of that statute, which are, that they must appear at some of the courts of Westminster, or at the quarter-sessions held for the county, city, or place where they shall reside, and shall make and subscribe a declaration, that they profess the roman catholic religion, and also an oath which is exactly similar to that required by the 18 Geo. III. c. 60., the substance of which is stated above in the text. Of this declaration and oath being duly made by any roman catholic, the officer of the court shall grant him a certificate; and such officer shall yearly transmit to the privy council lists of all persons who have thus qualified themselves within the year in his respective court. The statute then provides, that a roman catholic, thus qualified, shall not be prosecuted under any statute for not repairing to a parish church, nor shall he be prosecuted for being a papist, nor for attending or performing mass or other ceremonies of the church of Rome; provided that no place shall be allowed for an assembly to celebrate such worship until it is certified to the sessions; nor shall any minister officiate in it, until his name and description are recorded there. And no such place of assembly shall have it's doors locked or barred during the time of meeting or divine worship.

If any roman catholic whatever is elected constable, churchwarden, overseer, or into any parochial office, he may execute the same by a deputy, to be approved as if he were to act for himself as principal. But every minister, who has qualified, shall be exempt from serving upon juries, and from being elected into any parochial office. And all the laws for frequenting divine service on sundays, shall continue in force, except where persons attend some place of worship allowed by this statute, or the toleration act of the dissenters, 1 W. & M.

If any person disturb a congregation allowed under this act, he shall, as for disturbing a dissenting meeting, be bound over to the

IN order the better to ſecure the eſtabliſhed church againſt perils from non-conformiſts of all denominations, infidels, turks, jews, heretics, papiſts, and ſectaries, there are however

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the next ſeſſions, and upon conviction there, ſhall forfeit twenty pounds.

But no roman catholic miniſter ſhall officiate in any place of worſhip having a ſteeple and a bell, or at any funeral in a church or church-yard, or ſhall wear the habits of his order, except in a place allowed by this ſtatute, or in a private houſe, where there ſhall not be more than five perſons beſides the family. This ſtatute ſhall not exempt roman catholics from the payment of tithes, or other dues, to the church; nor ſhall it affect the ſtatutes concerning marriages, or any law reſpecting the ſucceſſion to the crown. No perſon, who has qualified, ſhall be proſecuted for inſtructing youth, except in an endowed ſchool, or a ſchool in one of the Engliſh univerſities; and except alſo, that no roman catholic ſchoolmaſter ſhall receive into his ſchool the child of any proteſtant father; nor ſhall any roman catholic keep a ſchool until his, or her, name be recorded as a teacher at the ſeſſions.

But no religious order is to be eſtabliſhed; and every endowment of a ſchool or college by a roman catholic ſhall ſtill be ſuperſtitious and unlawful. And no perſon henceforth ſhall be ſummoned to take the oath of ſupremacy, and the declaration againſt tranſubſtantiation. Nor ſhall roman catholics, who have qualified, be removable from London and Weſtminſter; neither ſhall any peer, who has qualified, be puniſhable for coming into the preſence, or palace, of the king or queen. And no papiſts whatever ſhall be any longer obliged to regiſter their names and eſtates, or enrol their deeds and wills. And every roman catholic, who has qualified, may be permitted to act as a barriſter, attorney, and notary.

The roman catholics cannot ſit in either houſe of parliament, becauſe every member of parliament muſt take the oath of ſupremacy, and repeat and ſubſcribe the declaration againſt tranſubſtantiation: ſee 1 vol. 162. Nor can they vote at elections for the members of the houſe of commons, becauſe, before they vote, they muſt take the oath of ſupremacy. *Ibid.* 180.

The roman catholics in Ireland are permitted to vote at elections, but they cannot ſit in either houſe of parliament.

two

two bulwarks erected; called the *corporation* and *teſt* acts: by the former of which [e] no perſon can be legally elected to any office relating to the government of any city or corporation, unleſs, within a twelvemonth before he has received the ſacrament of the lord's ſupper according to the rites of the church of England; and he is alſo enjoined to take the oaths of allegiance and ſupremacy at the ſame time that he takes the oath of office: or, in default of either of theſe requiſites, ſuch election ſhall be void (2). The other, called the teſt act [f], directs all officers civil and military to take the oaths and make the declaration againſt tranſubſtantiation, in any of the king's courts at Weſtminſter, or at the quarter ſeſſions, [59] within ſix calendar months after their admiſſion; and alſo within the ſame time (3) to receive the ſacrament of the lord's

[e] Stat. 13 Car. II. ſt. 2. c. 1.
[f] Stat. 25 Car. II. c. 2. explained by 9 Geo. II. c. 26.

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(2) By the 5 Geo. I. c. 6. § 3. the election into a corporate office ſhall not be void on account of the perſon elected having omitted to receive the ſacrament within a year before the election, unleſs he ſhall be removed within ſix months after his election, or unleſs a proſecution be commenced within that time, and be carried on without delay; and during that time the office is not void, but only voidable; and the perſon elected, until a removal or proſecution within the time limited, is entitled to all the incidental rights of his office in as full an extent as if he had actually received the ſacrament within a year previous to his election. 2 *Burr.* 1016.

(3) The 25 Car. II. c. 2. the original teſt act required, that both the ſacrament and the oaths ſhould be taken within three months; and by ſubſequent ſtatutes, the time for taking the oaths has been enlarged to ſix months; but the time for taking the ſacrament remains unaltered, which muſt ſtill be taken within three months after admiſſion into the office.

And by ſeveral ſtatutes ſubſequent to the teſt act, various deſcriptions of perſons, whoſe offices are not conſidered civil or military, are required to take the oaths within ſix months after their reſpective appointments, though they are not required to take the ſacrament. Amongſt theſe are all eccleſiaſtical perſons promoted to benefices, members of colleges, who have attained the age of 18 years,

ſupper, according to the uſage of the church of England, in ſome public church immediately after divine ſervice and ſermon, and to deliver into court a certificate thereof ſigned by the miniſter and church-warden, and alſo to prove the ſame by two credible witneſſes; upon forfeiture of 500 *l.* and diſability to hold the ſaid office (4). And of much the ſame nature with theſe is the ſtatute 7 Jac. I. c. 2. which permits no perſons to be naturalized or reſtored in blood, but ſuch as undergo a like teſt: which teſt having been removed in 1753, in favour of the Jews, was the next ſeſſion of parliament reſtored again with ſome precipitation.

THUS much for offences, which ſtrike at our national religion, or the doctrine and diſcipline of the church of England in particular. I proceed now to conſider ſome groſs impieties and general immoralities, which are taken notice of and puniſhed by our municipal law; frequently in concurrence with the eccleſiaſtical, to which the cenſure of many of them does alſo of right appertain; though with a view ſomewhat different: the ſpiritual court puniſhing all ſinful enormities for the ſake of reforming the private ſinner, *pro ſalute animae*; while the temporal courts reſent the public affront to religion and morality on which all government muſt depend for ſupport, and correct more for the ſake of example than private amendment.

IV. THE fourth ſpecies of offences therefore, more immediately againſt God and religion, is that of *blaſphemy* againſt the Almighty, by denying his being or providence; or by

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years, teachers of ſcholars or pupils, diſſenting miniſters, high conſtables, and practiſers of the law. 1 *Geo. I. ſt.* 2. *c.* 13. 2 *Geo. II. c.* 31. 9 *Geo. II. c.* 26.

(4) But before the end of every ſeſſion of parliament, an act is paſſed to indemnify all perſons who have not complied with the requiſition of the corporation and teſt acts, provided they qualify themſelves within a time ſpecified in the act; and provided alſo, that judgment in any action or proſecution has not been obtained againſt them for their former omiſſion.

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contumelious reproaches of our saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment [g]: for christianity is part of the laws of England [h] (5).

V. SOMEWHAT allied to this, though in an inferior degree, is the offence of profane and common *swearing* and *cursing*. By the last statute against which, 19 Geo. II. c. 21. [60] which repeals all former ones, every labourer, sailor, or soldier profanely cursing or swearing shall forfeit 1*s*. every other person under the degree of a gentleman 2*s*. and every gentleman or person of superior rank 5*s*. to the poor of the parish; and, on a second conviction, double; and, for every subsequent offence, treble the sum first forfeited; with all charges of conviction: and in default of payment shall be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing, or the testimony of one witness; and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him (6). If the justice omits his duty, he forfeits 5*l*. and the constable 40*s*. And the act is to be read in all parish churches, and public chapels, the sunday after every quarter day, on pain of 5*l*. to be levied by warrant

[g] 1 Hawk. P. C. 7. [h] 1 Ventr. 293. 2 Strange 834.

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(5) *Scripture est common ley, furquel touts manieres de leis sont fondues.* 34 *H. VI.* 40.

(6) The conviction must be within eight days after the offence, § 12. Each oath or curse being a distinct complete offence, there can be no question, I conceive, but a person may incur any number of penalties in one day, though Dr. Burn doubts whether any number of oaths or curses in one day amount to more than one offence. 3 *Burn.* 325.

Persons belonging to his majesty's navy, if guilty of profane cursing and swearing, are liable to suffer such punishment as a court martial shall think proper to inflict. 22 *Geo. II. c.* 33.

from any juſtice. Beſides this puniſhment for taking God's name in vain in common diſcourſe, it is enacted by ſtatute 3 Jac. I. c. 21. that if in any ſtage play, interlude, or ſhew, the name of the holy trinity, or any of the perſons therein, be jeſtingly or profanely uſed, the offender ſhall forfeit 10*l.*; one moiety to the king, and the other to the informer.

VI. A SIXTH ſpecies of offence againſt God and religion, of which our antient books are full, is a crime of which one knows not well what account to give. I mean the offence of *witchcraft*, *conjuration*, *enchantment*, or *ſorcery*. To deny the poſſibility, nay, actual exiſtence of witchcraft and ſorcery, is at once flatly to contradict the revealed word of God, in various paſſages both of the old and new teſtament: and the thing itſelf is a truth to which every nation in the world hath in it's turn borne teſtimony, either by examples ſeemingly well atteſted, or by prohibitory laws; which at leaſt ſuppoſe the poſſibility of a commerce with evil ſpirits. The civil law puniſhes with death not only the ſorcerers themſelves, but alſo thoſe who conſult them[i], imitating in the former the expreſs law of God[k], "thou ſhalt not ſuffer a witch to live." And our own laws, both before and ſince the conqueſt, have been equally penal; ranking this crime in the ſame claſs with he-
[61] reſy, and condemning both to the flames[l]. The preſident Monteſquieu[m] ranks them alſo both together, but with a very different view: laying it down as an important maxim, that we ought to be very circumſpect in the proſecution of magic and hereſy; becauſe the moſt unexceptionable conduct, the pureſt morals and the conſtant practice of every duty in life, are not a ſufficient ſecurity againſt the ſuſpicion of crimes like theſe. And indeed the ridiculous ſtories that are generally told, and the many impoſtures and deluſions that have been diſcovered in all ages, are enough to demoliſh all faith in ſuch a dubious crime; if the contrary evidence were not alſo extremely ſtrong. Wherefore it ſeems to be the moſt eligible way to conclude, with an ingenious writer of our own[n], that

[i] *Cod. l.* 9. *c.* 18.
[k] Exod. xxii. 18.
[l] 3 Inſt. 44.
[m] Sp. L. b. 12. c. 5.
[n] Mr. Addiſon, Spect. No. 117.

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in general there has been ſuch a thing as witchcraft; though one cannot give credit to any particular modern inſtance of it.

OUR forefathers were ſtronger believers, when they enacted by ſtatute 33 Hen. VIII. c. 8. all witchcraft and ſorcery to be felony without benefit of clergy; and again by ſtatute 1 Jac. I. c. 12. that all perſons invoking any evil ſpirit, or conſulting, covenanting with, entertaining, employing, feeding, or rewarding any evil ſpirit; or taking up dead bodies from their graves to be uſed in any witchcraft, ſorcery, charm, or inchantment; or killing or otherwiſe hurting any perſon by ſuch infernal arts, ſhould be guilty of felony without benefit of clergy, and ſuffer death. And, if any perſon ſhould attempt by ſorcery to diſcover hidden treaſure, or to reſtore ſtolen goods, or to provoke unlawful love, or to hurt any man or beaſt, though the ſame were not effected, he or ſhe ſhould ſuffer impriſonment and pillory for the firſt offence, and death for the ſecond. Theſe acts continued in force till lately, to the terror of all ancient females in the kingdom: and many poor wretches were ſacrificed thereby to the prejudice of their neighbours, and their own illuſions; not a few having, by ſome means or other, confeſſed the fact at the gallows. But all executions for this dubious crime are now at an end; our legiſlature having at length followed the wiſe example of Louis XIV. in France, who thought proper by an edict to reſtrain the tribunals of juſtice from receiving informations of witchcraft [o]. And accordingly it is with us enacted by ſtatute 9 Geo. II. c. 5. that no proſecution ſhall for the future be carried on againſt any perſon for conjuration, witchcraft, ſorcery, or inchantment (7). But the miſdemeſnor of perſons pretend- [62]

[o] Voltaire *Siecl. Louis xiv.* ch. 29. Mod. Un. Hiſt. xxv. 215. Yet Voughlans (*de droit criminel*, 353. 459.) ſtill reckons up ſorcery and witchcraft among the crimes puniſhable in France.

(7) In Ireland there is ſtill a ſtatute, inflicting capital puniſhment upon witches, unrepealed. It was paſſed in the 28th Eliz. and it deſcribes every ſpecies of the crime as minutely as the Engliſh ſtatute 1 Jac. I. c. 12.; and it even provides for the trial of peers, who might happen to be charged with that crime. 1 *Ld. Mountm. Hiſt. Iriſh Parliament.*

ing to uſe witchcraft, tell fortunes, or diſcover ſtolen goods by ſkill in the occult ſciences, is ſtill deſervedly puniſhed with a year's impriſonment, and ſtanding four times in the pillory.

VII. A SEVENTH ſpecies of offenders in this claſs are all *religious impoſtors*: ſuch as falſely pretend an extraordinary commiſſion from heaven; or terrify and abuſe the people with falſe denunciations of judgments. Theſe, as tending to ſubvert all religion, by bringing it into ridicule and contempt, are puniſhable by the temporal courts with fine, impriſonment, and infamous corporal puniſhment [p].

VIII. SIMONY, or the corrupt preſentation of any one to an eccleſiaſtical benefice for gift or reward, is alſo to be conſidered as an offence againſt religion; as well by reaſon of the ſacredneſs of the charge which is thus profanely bought and ſold, as becauſe it is always attended with perjury in the perſon preſented [q]. The ſtatute 31 Eliz. c. 6. (which, ſo far as it relates to the forfeiture of the right of preſentation, was conſidered in a former book [r]) enacts, that if any patron, for money or any other corrupt conſideration or promiſe, directly or indirectly given, ſhall preſent, admit, inſtitute, induct, inſtall, or collate any perſon to an eccleſiaſtical benefice or dignity, both the giver and taker ſhall forfeit two years value of the benefice or dignity; one moiety to the king, and the other to any one who will ſue for the ſame. If perſons alſo corruptly reſign or exchange their benefices, both the giver and taker ſhall in like manner forfeit double the value of the money or other corrupt conſideration (8). And perſons who

[p] 1 Hawk. P. C. 7. [q] 3 Inſt. 156. [r] See Vol. II. p 279.

(8) Any reſignation or exchange for money is corrupt, however apparently fair the tranſaction; as where a father, wiſhing that his ſon in orders ſhould be employed in the duties of his profeſſion, agreed to ſecure, by a bond, the payment of an annuity exactly equal to the annual produce of a benefice, in conſideration of the incumbent's reſigning in favour of his ſon. The annuity being afterwards in arrear, the bond was put in ſuit, and the defendant pleaded the ſimoniacal reſignation in bar; and lord Mansfield and the

ſhall corruptly ordain or licence any miniſter, or procure him to be ordained or licenced, (which is the true idea of ſimony,) ſhall incur a like forfeiture of forty pounds; and the miniſter himſelf of ten pounds, beſides an incapacity to hold any ec- [63] cleſiaſtical preferment for ſeven years afterwards. Corrupt elections and reſignations in colleges, hoſpitals, and other eleemoſynary corporations, are alſo puniſhed by the ſame ſtatute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown.

IX. PROFANATION of the Lord's day, vulgarly (but improperly) called *ſabbath-breaking*, is a ninth offence againſt God and religion, puniſhed by the municipal law of England. For, beſides the notorious indecency and ſcandal, of permitting any ſecular buſineſs to be publicly tranſacted on that day, in a country profeſſing chriſtianity, and the corruption of morals which uſually follows it's profanation, the keeping one day in ſeven holy, as a time of relaxation and refreſhment as well as for public worſhip, is of admirable ſervice to a ſtate, conſidered merely as a civil inſtitution. It humanizes by the help of converſation and ſociety the manners of the lower claſſes; which would otherwiſe degenerate into a ſordid ferocity and ſavage ſelfiſhneſs of ſpirit: it enables the induſtrious workman to purſue his occupation in the enſuing week with health and cheerfulneſs: it imprints on the minds of the people that ſenſe of their duty to God, ſo neceſſary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any ſtated times of recalling them to the worſhip of their maker. And therefore the laws of king Athelſtan [s] forbad all merchandizing on the Lord's day, under very ſevere penalties. And by the ſtatute 27 Hen. VI. c. 5. no fair or market ſhall be held on the prin-

[s] c. 24.

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the court, though they declared that it was an unconſcientious defence, yet as the reſignation had been made for money, determined, that it was corrupt and ſimoniacal, and in conſequence that the bond was void. *Young* v. *Jones*, *E. T.* 1782.

cipal feſtivals, good friday, or any ſunday, (except the four ſundays in harveſt,) on pain of forfeiting the goods expoſed to ſale. And, ſince by the ſtatute 1 Car. I. c. 1. no perſon ſhall aſſemble out of their own pariſhes, for any ſport whatſoever upon this day; nor, in their pariſhes, ſhall uſe any bull or bear baiting, interludes, plays, or other *unlawful* exerciſes, or paſtimes; on pain that every offender ſhall pay 3 *s.* 4 *d.* to the poor. This ſtatute does not prohibit, but rather impliedly allows, any innocent recreation or amuſement, within their
[64] reſpective pariſhes, even on the Lord's day, after divine ſervice is over. But by ſtatute 29 Car. II. c. 7. no perſon is allowed to *work* on the Lord's day, or uſe any boat or barge, or expoſe any goods to ſale; except meat in public houſes, milk at certain hours, and works of neceſſity or charity, on forfeiture of 5 *s.* Nor ſhall any drover, carrier, or the like, travel upon that day, under pain of twenty ſhillings (9).

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(9) Goods expoſed to ſale upon a ſunday are forfeited to the uſe of the poor, except that one-third may be allowed the informer; but milk may be ſold before nine in the morning, and after four in the afternoon. 29 *Car. II. c.* 7. Mackarel alſo may be ſold on ſundays before and after divine ſervice. 10 & 11 *W. III. c.* 24.

Forty watermen are permitted to ply upon the Thames betwixt Vauxhall and Limehouſe on ſundays; 11 & 12 *W. III. c.* 21. Fiſh carriages are allowed to travel on ſundays, either laden or returning empty. 2 *Geo. III. c.* 15. Perſons exerciſing their calling on a ſunday are only ſubject to one penalty; for the whole is but one offence, or one act of exerciſing, though continued the whole day. *Cowp.* 640.

Bakers were permitted to dreſs dinners on a ſunday as a work of neceſſity. 5 *T. R.* 449. But by the 34 Geo. III. c. 61. every baker ſhall be ſubject to a penalty of 10 *s.* to the uſe of the poor, for exerciſing his buſineſs in any manner as a baker, except that he may ſell bread between nine o'clock in the morning and one in the afternoon; and may alſo within that time bake meat, puddings, and pies for any perſon, who ſhall carry or ſend the ſame to be baked. The 21 Geo. III. c. 49. was paſſed to reſtrain an indecent practice, which had become very prevalent in London and Weſtminſter; it enacts, that if any houſe, room, or place is opened

X. DRUNKENNESS is alſo puniſhed by ſtatute 4 Jac. I. c. 5. with the forfeiture of 5 *s.*; or the ſitting ſix hours in the ſtocks (10): by which time the ſtatute preſumes the offender will have regained his ſenſes, and not be liable to do miſchief to his neighbours. And there are many wholeſome ſtatutes, by way of prevention, chiefly paſſed in the ſame reign of king James I. which regulate the licenſing of ale-houſes, and puniſh perſons found tippling therein; or the maſter of ſuch houſes permitting them (11).

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opened upon a ſunday for any public entertainment, or for debating upon any ſubject whatever, to which perſons are admitted by money or tickets, the keeper of it ſhall forfeit 200 *l.* to any perſon who will proſecute; the manager or preſident 100 *l.* and the receiver of the money or tickets 50 *l.*; and every perſon advertiſing, or printing an advertiſement of, ſuch a meeting, ſhall in like manner forfeit 50 *l.* for every offence.

(10) *i. e.* If he is not able to pay the penalty of 5 *s.*

(11) No licence ſhall be granted to any perſon to keep an alehouſe, but by two juſtices, at a public meeting of the magiſtrates of the county, diviſion, or place, in which the houſe is ſituated, and this muſt be done by the conſent of the majority preſent. The time and place of ſuch public meeting muſt be appointed by two of the magiſtrates at leaſt ten days previous to the meeting, which ſhall be held every year, either on the 1ſt of September, or within twenty days afterwards. The licence muſt be renewed every year; and no licence ſhall be originally granted to any one, unleſs he produce a certificate ſigned by the miniſter of the pariſh, and the majority of the churchwardens and overſeers; or a certificate ſigned by three or four reſpectable houſeholders, teſtifying that the perſon applying is a perſon of good character. 26 *Geo. II. c.* 31. 1 *Burr.* 556.

Where an alehouſe-keeper dies or removes, if his executor, adminiſtrator, aſſign, or the new tenant, obtains ſuch a certificate within thirty days after the death, or removal, or entry into the empty houſe, and produces it to the magiſtrates at the next petty ſeſſions, they may, if they think proper, grant him a licence, until the next general licenſing day. And till the next petty ſeſſions, ſuch perſon is indemnified for keeping the houſe open as an ale-

XI. THE laſt offence which I ſhall mention, more immediately againſt religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdneſs*; either by frequenting houſes of ill fame, which is an indict-
[65] able offence[t]; or by ſome groſsly ſcandalous and public indecency, for which the puniſhment is by fine and impriſonment[u] (12). In the year 1650, when the ruling power found it

[t] Poph. 208. [u] 1 Siderf. 168.

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houſe, provided he obtains his certificate within the time limited, though he is afterwards refuſed a licence. 32 *Geo. III. c.* 59.

This ſtatute, 32 Geo. III. c. 59, ſeems to include, though not clearly expreſſed, ale-houſes within corporations. But by 26 Geo. II. c. 31., perſons not licenſed the year before, need not produce certificates; and the general meeting for granting licences need not be held in September. 3 *T. R.* 560. Every perſon licenſed muſt enter into a recognizance of 10*l.*, with two ſureties in 5*l.* each, for his good behaviour. And perſons ſelling ale without a licence, are ſubject to ſevere penalties. No perſon can ſell ſpirituous liquors or wine by retail, under a licence from the commiſſioners of exciſe, without alſo having a licence to ſell ale from the juſtices. 5 *Geo. III. c.* 46. 32 *Geo. III. c.* 59. 3 *T. R.* 560.

Juſtices of the peace have an abſolute and uncontrolled power and diſcretion in granting and refuſing ale-licences; but if it ſhould appear from their own declarations, or the circumſtances of their conduct, that they have either refuſed or granted a licence from a partial or corrupt motive, they are puniſhable in the court of king's bench by information, or they may be proſecuted by indictment. 1 *Burr.* 556. 1 *T. R.* 692. Magiſtrates are afraid of aſſigning reaſons for their conduct in this branch of their duty; but however frivolous and futile the reaſons may be, if the motive and intent are good, they cannot be ſubject to puniſhment. See the laws reſpecting ale-houſes more fully ſtated in 1 *Burn*, tit. *Ale-houſe.*

(12) Many offences of the incontinent kind fall properly under the juriſdiction of the eccleſiaſtical court, and are appropriated to it. But except thoſe appropriated caſes, the court of king's bench is the *cuſtos morum* of the people, and has the ſuperintendency of offences *contra bonos mores.* 3 *Burr.* 1438. In that court, a gentleman was fined 2000 marks, and impriſoned, for expoſing himſelf naked

for their intereſt to put on the ſemblance of a very extraordinary ſtrictneſs and purity of morals, not only inceſt and wilful adultery were made capital crimes; but alſo the repeated act of keeping a brothel, or committing fornication, were (upon a ſecond conviction) made felony without benefit of clergy [w]. But at the reſtoration, when men, from an abhorrence of the hypocriſy of the late times, fell into a contrary extreme of licentiouſneſs, it was not thought proper to renew a law of ſuch unfaſhionable rigour. And theſe offences have been ever ſince left to the feeble coercion of the ſpiritual court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay even adultery itſelf, with a

[w] Scobell. 124.

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naked in a public ſtreet. 1 *Sid.* 168. And an information has been granted againſt a number of perſons concerned in aſſigning a young girl as an apprentice to a gentleman, under pretence of learning muſic, but for the purpoſes of proſtitution. 3 *Burr.* 1438. There is alſo an inſtance of an information for a conſpiracy againſt a peer and ſeveral others for enticing away a young lady from her father's houſe, and procuring her ſeduction. The young lady was the ſiſter of his wife. That circumſtance was undoubtedly a great aggravation of the offence, yet it's exiſtence in the caſe was not neceſſary to give the court cognizance of the proſecution. 3 *St. Tr.* 519. In a caſe, where a huſband had formally aſſigned his wife over to another man, lord Hardwicke directed a proſecution for that tranſaction, as being notoriouſly and groſsly againſt public decency and good manners. 3 *Burr.* 1438. It is extraordinary that proſecutions are not inſtituted againſt thoſe who publicly ſell their wives, and againſt thoſe who buy them. Such a practice is ſhameful and ſcandalous in itſelf, and encourages other acts of criminality and wickedneſs. It now prevails to a degree, that the puniſhment of ſome, convicted of this offence, by expoſure in the pillory would afford a ſalutary example. All ſuch acts of indecency and immorality are public miſdemeanours, and the offenders may be puniſhed either by an information granted by the court of king's bench, or by an indictment preferred before a grand jury at the aſſizes or quarter ſeſſions.

great degree of tenderneſs and lenity; owing perhaps to the conſtrained celibacy of it's firſt compilers. The temporal courts therefore take no cognizance of the crime of adultery, otherwiſe than as a private injury [x].

BUT, before we quit this ſubject, we muſt take notice of the temporal puniſhment for having *baſtard children*, conſidered in a criminal light; for with regard to the maintenance of ſuch illegitimate offspring, which is a civil concern, we have formerly ſpoken at large [y]. By the ſtatute 18 Eliz. c. 3. two juſtices may take order for the puniſhment of the mother and reputed father; but what that puniſhment ſhall be is not therein aſcertained; though the contemporary expoſition was, that a corporal puniſhment was intended [z]. By ſtatute 7 Jac. I. c. 4. a ſpecific puniſhment (*viz.* commitment to the houſe of correction) is inflicted on the woman only. But in both caſes, it ſeems that the penalty can only be inflicted if the baſtard becomes chargeable to the pariſh; for otherwiſe the very maintenance of the child is conſidered as a degree of puniſhment. By the laſt mentioned ſtatute the juſtices may commit the mother to the houſe of correction, there to be puniſhed and ſet on work for one year; and, in caſe of a ſecond offence, till ſhe find ſureties never to offend again.

[x] See vol. III. pag. 139. [y] See vol. I. pag. 458. [z] Dalt. juſt. ch. 11.

CHAPTER THE FIFTH.

OF OFFENCES AGAINST THE LAW OF NATIONS.

ACCORDING to the method marked out in the preceding chapter, we are next to consider the offences more immediately repugnant to that universal law of society, which regulates the mutual intercourse between one state and another; those, I mean, which are particularly animadverted on, as such, by the English law.

THE law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world [a]; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each [b]. This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and in time of war as little harm as possible, without prejudice to their own real interests [c]. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those

[a] *Ef.* 1. 1. 9.
[b] See vol. I. pag. 43.
[c] Sp. L. b. 1. c. 7.

principles of natural juſtice, in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the reſpective communities; in the conſtruction of which there is alſo no judge to reſort to, but the law of nature and reaſon, being the only one in which all the contracting parties are equally converſant, and to which they are equally ſubject.

IN arbitrary ſtates this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but ſince in England no royal power can introduce a new law, or ſuſpend the execution of the old, therefore the law of nations (wherever any queſtion ariſes which is properly the object of it's juriſdiction) is here adopted in it's full extent by the common law, and is held to be a part of the law of the land. And thoſe acts of parliament, which have from time to time been made to enforce this univerſal law, or to facilitate the execution of it's deciſions, are not to be conſidered as introductive of any new rule, but merely as declaratory of the old fundamental conſtitutions of the kingdom; without which it muſt ceaſe to be a part of the civilized world. Thus in mercantile queſtions, ſuch as bills of exchange and the like; in all marine cauſes, relating to freight, average, demurrage, inſurances, bottomry, and others of a ſimilar nature; the law-merchant[d], which is a branch of the law of nations, is regularly and conſtantly adhered to. So too in all diſputes relating to prizes, to ſhipwrecks, to hoſtages, and ranſom bills, there is no other rule of deciſion but this great univerſal law, collected from hiſtory and uſage, and ſuch writers of all nations and languages as are generally approved and allowed of.

BUT, though in civil tranſactions and queſtions of property between the ſubjects of different ſtates, the law of nations has much ſcope and extent, as adopted by the law of England; yet the preſent branch of our inquiries will fall

[d] See vol. I. pag. 273.

within

within a narrow compaſs, as offences againſt the law of nations can rarely be the object of the criminal law of any particular ſtate. For offences againſt this law are principally incident to whole ſtates or nations; in which caſe recourſe can only be had to war; which is an appeal to the God of hoſts, to puniſh ſuch infractions of public faith, as are committed by one independent people againſt another: neither ſtate having any ſuperior juriſdiction to reſort to upon earth for juſtice. But where the individuals of any ſtate violate this general law, it is then the intereſt as well as duty of the government, under which they live, to animadvert upon them with a becoming ſeverity, that the peace of the world may be maintained. For in vain would nations in their collective capacity obſerve theſe univerſal rules, if private ſubjects were at liberty to break them at their own diſcretion, and involve the two ſtates in a war. It is therefore incumbent upon the nation injured, firſt to demand ſatisfaction and juſtice to be done on the offender, by the ſtate to which he belongs; and, if that be refuſed or neglected, the ſovereign then avows himſelf an accomplice or abettor of his ſubject's crime, and draws upon his community the calamities of foreign war.

THE principal offences againſt the law of nations, animadverted on as ſuch by the municipal laws of England, are of three kinds; 1. Violation of ſafe-conducts; 2. Infringement of the rights of embaſſadors; and, 3. Piracy.

I. As to the firſt, *violation* of *ſafe-conducts* or *paſſports*, expreſsly granted by the king or his embaſſadors [e] to the ſubjects of a foreign power in time of mutual war; or committing acts of hoſtilities againſt ſuch as are in amity, league, or truce with us, who are here under a general implied ſafe-conduct: theſe are breaches of the public faith, without the preſervation of which there can be no intercourſe or commerce between one nation and another: and ſuch offences may, according to the writers upon the law of nations, be a juſt ground of a national war: ſince it is not in the power of

[e] See vol. I, pag. 260.

the

the foreign prince to cauſe juſtice to be done to his ſubjects by the very individual delinquent, but he muſt require it of the whole community. And as during the continuance of any ſafe-conduct, either expreſs or implied, the foreigner is under the protection of the king and the law; and, more eſpecially, as it is one of the articles of *magna carta*[f], that foreign merchants ſhould be entitled to ſafe-conduct and ſecurity throughout the kingdom; there is no queſtion but that any violation of either the perſon or property of ſuch foreigner may be puniſhed by indictment in the name of the king, whoſe honour is more particularly engaged in ſupporting his own ſafe-conduct. And, when this malicious rapacity was not confined to private individuals, but broke out into general hoſtilities, by the ſtatute 2 Hen. V. ſt. 1. c. 6. breaking of truce and ſafe-conducts, or abetting and receiving the truce-breakers, was (in affirmance and ſupport of the law of nations) declared to be high treaſon againſt the crown and dignity of the king; and conſervators of truce and ſafe-conducts were appointed in every port, and empowered to hear and determine ſuch treaſons (when committed at ſea) according to the antient marine law then practiſed in the admiral's court; and, together with two men learned in the law of the land, to hear and determine according to that law the ſame treaſons, when committed within the body of any county. Which ſtatute, ſo far as it made theſe offences amount to treaſon, was ſuſpended by 14 Hen. VI. c. 8. and repealed by 20 Hen. VI. c. 11. but revived by 29 Hen. VI. c. 2. which gave the ſame powers to the lord chancellor, aſſociated with either of the chief juſtices, as belonged to the conſervators of truce and their aſſeſſors; and enacted that, notwithſtanding the party be convicted of treaſon, the injured ſtranger ſhould have reſtitution out of his effects, prior to any claim of the crown. And it is farther enacted by the ſtatute 31 Hen. VI. c. 4. that if any of the king's ſubjects attempt or offend, upon the ſea, or in any port within the king's obeyſance, againſt any ſtranger in amity, league, or truce, or under ſafe-conduct; and eſpecially by attaching

[f] 9 *Hen. III.* c. 30. See vol. I. pag. 259, &c.

his

his perſon, or ſpoiling him or robbing him of his goods; the lord chancellor with any of the juſtices of either the king's-bench, or common pleas, may cauſe full reſtitution and amends to be made to the party injured.

IT is to be obſerved, that the ſuſpending and repealing acts of 14 & 20 Hen. VI. and alſo the reviving act of 29 Hen. VI. were only temporary: ſo that it ſhould ſeem that after the expiration of them all, the ſtatute 2 Hen. V. continued in full force: but yet it is conſidered as extinct by the ſtatute 14 Edw. IV. c. 4. which revives and confirms all ſtatutes and ordinances, made before the acceſſion of the houſe of York, againſt breakers of amities, truces, leagues, and ſafe-conducts, with an expreſs exception to the ſtatute of 2 Hen. V. But (however that may be) I apprehend it was finally repealed by the general ſtatutes of Edward VI. and queen Mary, for aboliſhing new-created treaſons: though ſir Matthew Hale ſeems to queſtion it as to treaſons committed on the ſea[g]. But certainly the ſtatute of 31 Hen. VI. remains in full force to this day.

II. As to the rights of *embaſſadors*, which are alſo eſtabliſhed by the law of nations, and are therefore matter of univerſal concern, they have formerly been treated of at large[h]. It may here be ſufficient to remark, that the common law of England recognizes them in their full extent, by immediately ſtopping all legal proceſs, ſued out through the ignorance or raſhneſs of individuals, which may intrench upon the immunities of a foreign miniſter or any of his train. And, the more effectually to enforce the law of nations in this reſpect, when violated through wantonneſs or inſolence, it is declared by the ſtatute 7 Ann. c. 12. that all proceſs whereby the perſon of any embaſſador, or of his domeſtic or domeſtic ſervant, may be arreſted, or his goods diſtrained or ſeiſed, ſhall be utterly null and void; and that all perſons proſecuting, ſoliciting, or executing ſuch proceſs, being convicted by confeſſion or the oath of one witneſs, before the

[g] 1 Hal. P. C. 267.

[h] See vol. I. pag. 253.

lord

lord chancellor and the chief juſtices, or any two of them, ſhall be deemed violators of the laws of nations, and diſturbers of the public repoſe; and ſhall ſuffer ſuch penalties and corporal puniſhment as the ſaid judges, or any two of them, ſhall think fit [i]. Thus, in caſes of extraordinary outrage, for which the law hath provided no ſpecial penalty, the legiſlature hath intruſted to the three principal judges of the kingdom an unlimited power of proportioning the puniſhment to the crime.

III. LASTLY, the crime of *piracy*, or robbery and depredation upon the high ſeas, is an offence againſt the univerſal law of ſociety; a pirate being, according to ſir Edward Coke [k], *hoſtis humani generis*. As therefore he has renounced all the benefits of ſociety and government, and has reduced himſelf afreſh to the ſavage ſtate of nature, by declaring war againſt all mankind, all mankind muſt declare war againſt him: ſo that every community hath a right, by the rule of ſelf-defence, to inflict that puniſhment upon him, which every individual would in a ſtate of nature have been otherwiſe entitled to do, for any invaſion of his perſon or perſonal property.

BY the antient common law, piracy, if committed by a ſubject, was held to be a ſpecies of treaſon, being contrary to his natural allegiance; and by an alien to be felony only: but now, ſince the ſtatute of treaſons, 25 Edw. III. c. 2. it is held to be only felony in a ſubject [l]. Formerly it was only cognizable by the admiralty courts, which proceed by the rules of the civil law [m]. But, it being inconſiſtent with the liberties of the nation, that any man's life ſhould be taken away, unleſs by the judgment of his peers, or the common law of the land, the ſtatute 28 Hen. VIII. c. 15. eſtabliſhed a new juriſdiction for this purpoſe; which proceeds according to the courſe of the common law, and of which we ſhall ſay more hereafter.

[i] See the occaſion of making this ſtatute; vol. I. pag. 255.

[k] 3 Inſt. 113.

[l] *Ibid.*

[m] 1 Hawk. P. C. 98.

THE

THE offence of piracy, by common law, conſiſts in committing thoſe acts of robbery and depredation upon the high ſeas, which, if committed upon land, would have amounted to felony there [n]. But, by ſtatute, ſome other offences are made piracy alſo: as, by ſtatute 11 & 12 W. III. c. 7. if any natural born ſubject commits any act of hoſtility upon the high ſeas, againſt others of his majeſty's ſubjects, under colour of a commiſſion from any foreign power; this, though it would only be an act of war in an alien, ſhall be conſtrued piracy in a ſubject. And farther, any commander, or other ſeafaring perſon, betraying his truſt, and running away with any ſhip, boat, ordinance, ammunition, or goods; or yielding them up voluntarily to a pirate; or conſpiring to do theſe acts; or any perſon aſſaulting the commander of a veſſel to hinder him from fighting in defence of his ſhip, or confining him, or making or endeavouring to make a revolt on board; ſhall, for each of theſe offences, be adjudged a pirate, felon, and robber, and ſhall ſuffer death, whether he be principal, or merely acceſſory by ſetting forth ſuch pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. And the ſtatute 4 Geo. I. c. 11. expreſsly excludes the principals from the benefit of clergy. By the ſtatute 8 Geo. I. c. 24. the trading with known pirates, or furniſhing them with ſtores or ammunition, or fitting out any veſſel for that purpoſe, or in any wiſe conſulting, combining, confederating, or correſponding with them; or the forcibly boarding any merchant veſſel, though without ſeiſing or carrying her off, and deſtroying or throwing any of the goods over board; ſhall be deemed piracy: and ſuch acceſſories to piracy as are deſcribed by the ſtatute of king William, are declared to be principal pirates, and all pirates convicted by virtue of this act are made felons without benefit of clergy. By the ſame ſtatutes alſo, (to encourage the defence of merchant veſſels againſt pirates,) the commanders or ſeamen wounded, and the widows of ſuch ſeamen as are ſlain, in any piratical engagement, ſhall be entitled to a bounty, to be divided among them, not exceeding one fiftieth part of [73]

[n] 1 Hawk. P. C. 100.

the value of the cargo on board: and ſuch wounded ſeamen ſhall be entitled to the penſion of Greenwich hoſpital; which no other ſeamen are, except only ſuch as have ſerved in a ſhip of war. And if the commander ſhall behave cowardly, by not defending the ſhip, if ſhe carries guns or arms, or ſhall diſcharge the mariners from fighting, ſo that the ſhip falls into the hands of pirates, ſuch commander ſhall forfeit all his wages, and ſuffer ſix months impriſonment. Laſtly, by ſtatute 18 Geo. II. c. 30. any natural born ſubject, or denizen, who in time of war ſhall commit hoſtilities at ſea againſt any of his fellow-ſubjects, or ſhall aſſiſt an enemy on that element, is liable to be tried and convicted as a pirate.

THESE are the principal caſes, in which the ſtatute law of England interpoſes, to aid and enforce the law of nations, as a part of the common law: by inflicting an adequate puniſhment upon offences againſt that univerſal law, committed by private perſons. We ſhall proceed in the next chapter to conſider offences, which more immediately affect the ſovereign executive power of our own particular ſtate, or the king and government; which ſpecies of crimes branches itſelf into a much larger extent, than either of thoſe of which we have already treated.

CHAPTER THE SIXTH.

OF HIGH TREASON.

THE third general diviſion of crimes conſiſts of ſuch as more eſpecially affect the ſupreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the leaſt to a criminal neglect of that duty, which is due from every ſubject to his ſovereign. In a former part of theſe commentaries [a] we had occaſion to mention the nature of allegiance, as the tie or *ligamen* which binds every ſubject to be true and faithful to his ſovereign *liege* lord the king, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honour; and not to know or hear of any ill intended him, without defending him therefrom. And this allegiance, we may remember, was diſtinguiſhed into two ſpecies: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens alſo. Every offence therefore more immediately affecting the royal perſon, his crown, or dignity, is in ſome degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by reſidence: and theſe may be diſtinguiſhed into four kinds; 1. Treaſon. 2. Felonies injurious to the king's prerogative. 3. *Praemunire*. 4. Other miſpriſions and contempts. Of which crimes the firſt and principal is that of treaſon.

TREASON, *proditio*, in it's very name (which is borrowed from the French) imports a betraying, treachery, or breach [75]

[a] Book I. ch. 10.

of faith. It therefore happens only between allies, ſaith the Mirror[b]: for treaſon is indeed a general appellation, made uſe of by the law, to denote not only offences againſt the king and government, but alſo that accumulation of guilt which ariſes whenever a ſuperior repoſes a confidence in a ſubject or inferior, between whom and himſelf there ſubſiſts a natural, a civil, or even a ſpiritual relation: and the inferior ſo abuſes that confidence, ſo forgets the obligations of duty, ſubjection, and allegiance; as to deſtroy the life of any ſuch ſuperior or lord[c]. This is looked upon as proceeding from the ſame principle of treachery in private life, as would have urged him who harbours it to have conſpired in public againſt his liege lord and ſovereign, and therefore for a wife to kill her lord or huſband, a ſervant his lord or maſter, and an eccleſiaſtic his lord or ordinary; theſe, being breaches of the lower allegiance, of private and domeſtic faith, are denominated *petit* treaſons. But when diſloyalty ſo rears it's creſt, as to attack even majeſty itſelf, it is called by way of eminent diſtinction *high* treaſon, *alta proditio;* being equivalent to the *crimen laeſae majeſtatis* of the Romans, as Glanvil[d] denominates it alſo in our Engliſh law.

As this is the higheſt civil crime, which (conſidered as a member of the community) any man can poſſibly commit, it ought therefore to be the moſt preciſely aſcertained. For if the crime of high treaſon be indeterminate, this alone (ſays the preſident Monteſquieu) is ſufficient to make any government degenerate into arbitrary power[e]. And yet, by the antient common law, there was a great latitude left in the breaſt of the judges, to determine what was treaſon, or not ſo: whereby the creatures of tyrannical princes had opportunity to create abundance of conſtructive treaſons; that is, to raiſe, by forced and arbitrary conſtructions, offences into
[76] the crime and puniſhment of treaſon, which never were ſuſpected to be ſuch. Thus the *accroaching*, or attempting to

[b] c. 1. § 7.
[c] *LL. Aelfredi.* c. 4. *Aethelſt.* c. 4. *Canuti.* c. 54. 61.
[d] *l.* 1. c. 2.
[e] Sp. L. b. 12. c. 7.

exerciſe,

exercise, royal power (a very uncertain charge) was in the 21 Edw. III. held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90*l.*[f]: a crime, it must be owned, well deserving of punishment: but which seems to be of a complexion very different from that of treason. Killing the king's father, or brother, or even his messenger, has also fallen under the same denomination[g]. The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the ministers of the prince shall be treason[h]. But however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2. was made; which defines what offences only for the future should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans, promulged by Augustus Cæsar, comprehended all the antient laws, that had before been enacted to punish transgressors against the state[i]. This statute must therefore be our text and guide, in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

1. "WHEN a man doth compass or imagine the death of "our lord the king, of our lady his queen, or of their eldest "son and heir." Under this description it is held that a queen regnant (such as queen Elizabeth and queen Anne) is within the words of the act, being invested with royal power and entitled to the allegiance of her subjects[j]: but the husband of such a queen is not comprized within these words, and therefore no treason can be committed against him[k]. [77] The king here intended is the king in possession, without

[f] 1 Hal. P. C. 80.

[g] Britt. c. 22. 1 Hawk. P. C. 34.

[h] *Qui de nece virorum illustrium, qui consiliis et consistorio nostro interfuit, senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cujuslibet posterno, qui militat nobiscum, cogitaverit: (eadem enim severitate voluntatem sceleris, qua effectum, puniri jura voluerint) ipse quidem, utpote majestatis reus, gladio feriatur, bonis ejus omnibus fisco nostro addictis.* (*Cod.* 9. 8. 5.)

[i] Gravin. *Orig.* 1. § 34.

[j] 1 Hal. P. C. 101.

[k] 3 Inst. 7. 1 Hal. P. C. 106.

any reſpect to his title: for it is held, that a king *de facto* and not *de jure*, or in other words an uſurper that hath got poſſeſſion of the throne, is a king within the meaning of the ſtatute; as there is a temporary allegiance due to him, for his adminiſtration of the government, and temporary protection of the public: and therefore treaſons committed againſt Henry VI. were puniſhed under Edward IV. though all the line of Lancaſter had been previouſly declared uſurpers by act of parliament. But the moſt rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary poſſeſſion of the throne, as was the caſe of the houſe of York during the three reigns of the line of Lancaſter, is not a king within this ſtatute againſt whom treaſons may be committed [l]. And a very ſenſible writer on the crown-law carries the point of poſſeſſion ſo far, that he holds [m], that a king out of poſſeſſion is ſo far from having any right to our allegiance, by any other title which he may ſet up againſt the king in being, that we are bound by the duty of our allegiance to reſiſt him. A doctrine which he grounds upon the ſtatute 11 Hen. VII. c. 1. which is declaratory of the common law, and pronounces all ſubjects excuſed from any penalty or forfeiture, which do aſſiſt and obey a king *de facto*. But in truth, this ſeems to be confounding all notions of right and wrong; and the conſequence would be, that when Cromwell had murdered the elder Charles, and uſurped the power (though not the name) of king, the people were bound in duty to hinder the ſon's reſtoration: and were the king of Poland or Morocco to invade this kingdom, and by any means to get poſſeſſion of the crown, (a term, by the way, of very looſe and indiſtinct ſignification,) the ſubject would be bound by his allegiance to fight for his natural prince to-day, and by the ſame duty of allegiance to fight againſt him to-morrow. The true diſtinction ſeems to be, that the ſtatute of Henry
[78] the ſeventh does by no means *command* any oppoſition to a king *de jure*; but *excuſes* the obedience paid to a king *de facto*. When therefore a uſurper is in poſſeſſion, the ſubject is *excuſed* and *juſtified* in obeying and giving him aſ-

[l] 3 Inſt. 7. 1 Hal. P. C. 104.

[m] 1 Hawk. P. C. 36.

ſiſtance:

ſiſtance: otherwiſe, under a uſurpation, no man could be ſafe; if the lawful prince had a right to hang him for obedience to the powers in being, as the uſurper would certainly do for diſobedience. Nay farther, as the maſs of people are imperfect judges of title, of which in all caſes poſſeſſion is *prima facie* evidence, the law compels no man to yield obedience to that prince, whoſe right is by want of poſſeſſion rendered uncertain and diſputable, till providence ſhall think fit to interpoſe in his favour, and decide the ambiguous claim: and therefore, till he is entitled to ſuch allegiance by poſſeſſion, no treaſon can be committed againſt him. Laſtly, a king who has reſigned his crown, ſuch reſignation being admitted and ratified in parliament, is according to ſir Matthew Hale no longer the object of treaſon [n]. And the ſame reaſon holds, in caſe a king abdicates the government; or, by actions ſubverſive of the conſtitution, virtually renounces the authority which he claims by that very conſtitution: ſince, as was formerly obſerved [o], when the fact of abdication is once eſtabliſhed, and determined by the proper judges, the conſequence neceſſarily follows, that the throne is thereby vacant, and he is no longer king.

LET us next ſee, what is a *compaſſing* or *imagining* the death of the king, &c. Theſe are ſynonymous terms; the word *compaſs* ſignifying the purpoſe or deſign of the mind or will [p], and not, as in common ſpeech, the carrying ſuch deſign to effect [q]. And therefore an accidental ſtroke, which may mortally wound the ſovereign, *per infortunium*, without any traiterous intent, is no treaſon: as was the caſe of ſir Walter Tyrrel, who, by the command of king William Rufus, ſhooting at a hart, the arrow glanced againſt a tree, and killed the king on the ſpot [r]. But, as this compaſſing or imagining is an act of the mind, it cannot poſſibly fall under any judicial cognizance, unleſs it be demonſtrated by [79]

[n] 1 Hal. P. C. 104.

[o] Vol. I. pag. 212.

[p] By the antient law *compaſſing* or intending the death of any man, demonſtrated by ſome evident fact, was equally penal as homicide itſelf. (3 Inſt. 5.)

[q] 1 Hal. P. C. 107.

[r] 3 Inſt. 6.

ſome open, or *overt*, act (1). And yet the tyrant Dionyſius is recorded [s] to have executed a ſubject, barely for dreaming that he had killed him; which was held for ſufficient proof, that he had thought thereof in his waking hours. But ſuch is not the temper of the Engliſh law; and therefore in this, and the three next ſpecies of treaſon, it is neceſſary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon. The ſtatute expreſsly requires, that the accuſed "be thereof upon ſufficient proof "attainted of ſome open act by men of his own condition." Thus, to provide weapons or ammunition for the purpoſe of killing the king, is held to be a palpable overt act of treaſon in imagining his death [t]. To conſpire to impriſon the king by force, and move towards it by aſſembling company, is an overt act of compaſſing the king's death [u]; for all force, uſed to the perſon of the king, in it's conſequence may tend to his death, and is a ſtrong preſumption of ſomething worſe intended than the preſent force, by ſuch as have ſo far thrown

[s] Plutarch. *in vit.* [t] 3 Inſt. 12. [u] 1 Hal. P. C. 109.

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(1) In the caſe of the regicides, the indictment charged, that they did traiterouſly compaſs and imagine the death of the king. And the taking off his head was laid, among others, as an overt act of compaſſing. And the perſon who was ſuppoſed to have given the ſtroke was convicted on the ſame indictment.

For the compaſſing is conſidered as the treaſon, the overt acts as the means made uſe of to effectuate the intentions of the heart.

And in every indictment for this ſpecies of treaſon, and indeed for levying war, or adhering to the king's enemies, an overt act muſt be alleged and proved. For the overt act is the charge, to which the priſoner muſt apply his defence. But it is not neceſſary, that the whole of the evidence intended to be given ſhould be ſet forth; the common law never required this exactneſs, nor doth the ſtatute of King William require it. It is ſufficient, that the charge be reduced to a reaſonable certainty, ſo that the defendant may be apprized of the nature of it, and prepared to give an anſwer to it. *Foſt.* 194.

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off their bounden duty to their ſovereign; it being an old obſervation, that there is generally but a ſhort interval between the priſons and the graves of princes. There is no queſtion alſo, but that taking any meaſures to render ſuch treaſonable purpoſes effectual, as aſſembling and conſulting on the means to kill the king, is a ſufficient overt act of high-treaſon [w] (2).

[w] 1 Hawk. P. C. 38. 1 Hal. P. C. 119.

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(2) This ſubject is ſo ably explained by Mr. Juſtice Foſter in his firſt diſcourſe on high treaſon, that I think it may be uſeful to annex here two of his ſections.

In the caſe of the King the ſtatute of treaſons hath, with great propriety, retained the rule *voluntas pro facto*. The principle upon which this is founded is too obvious to need much enlargement. The king is conſidered as the head of the body-politic, and the members of that body are conſidered as united and kept together by a political union with him and with each other. His life cannot, in the ordinary courſe of things, be taken away by treaſonable practices without involving a whole nation in blood and confuſion; conſequently every ſtroke levelled at his perſon is, in the ordinary courſe of things, levelled at the public tranquillity. The law, therefore, tendereth the ſafety of the king with an anxious concern; and, if I may uſe the expreſſion, with a concern bordering upon jealouſy. It conſidereth the wicked imaginations of the heart in the ſame degree of guilt as if carried into actual execution from the moment meaſures appear to have been taken to render them effectual. And, therefore, if conſpirators meet and conſult how to kill the king, though they do not then fall upon any ſcheme for that purpoſe, this is an overt act of compaſſing his death; and ſo are all means made uſe of, be it advice, perſuaſion, or command, to incite or encourage others to commit the fact, or join in the attempt; and every perſon who but aſſenteth to any overtures for that purpoſe will be involved in the ſame guilt.

The care the law hath taken for the perſonal ſafety of the king is not confined to actions or attempts of the more flagitious kind, to aſſaſſination or poiſon, or other attempts directly and immediately aiming at his life. It is extended to every thing wilfully

How far mere *words*, ſpoken by an individual, and not relative to any treaſonable act or deſign then in agitation, ſhall amount to treaſon, has been formerly matter of doubt. We have two inſtances in the reign of Edward the fourth,
[80] of perſons executed for treaſonable words: the one a citizen of London, who ſaid he would make his ſon heir of the *crown*, being the ſign of the houſe in which he lived; the other a gentleman, whoſe favourite buck the king killed in hunting, whereupon he wiſhed it, horns and all, in the king's belly(3). Theſe were eſteemed hard caſes: and the chief juſtice Markham rather choſe to leave his place than aſſent to the latter judgment[x]. But now it ſeems clearly to be agreed, that, by the common law and the ſtatute of Edward III. words ſpoken amount only to a high miſdemeſnor, and no treaſon. For they may be ſpoken in heat, without any intention, or be miſtaken, perverted, or miſ-remembered by the hearers; their meaning depends always on their connexion with other words, and things; they may ſignify differently even according to the tone of voice, with which they are de-

[x] 1 Hal. P. C. 115.

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wilfully and deliberately done or attempted, whereby his life may be endangered. And, therefore, the entering into meaſures for depoſing or impriſoning him, or to get his perſon into the power of the conſpirators, theſe offences are overt acts of treaſon within this breach of the ſtatute. For experience has ſhewn that between the priſons and the graves of princes the diſtance is very ſmall. *Foſt.* 194.

This was the ſpecies of treaſon with which the ſtate priſoners were charged, who were tried in 1794. And the queſtion, as ſtated by the court for the jury to try, was, Whether their meaſures had been entered into with an intent to ſubvert the monarchy and to depoſe the king? See *Hardy*'s trial.

(3) There was even a refinement and degree of ſubtlety in the cruelty of that caſe, for he wiſhed it, horns and all, in the belly of him who counſelled the king to kill it; and as the king killed it of his own accord, or was his own counſellor, it was held to be a treaſonable wiſh againſt the king himſelf. 1 *Hal. P. C.* 115.

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livered; and ſometimes ſilence itſelf is more expreſſive than any diſcourſe. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreaſonable to make them amount to high treaſon. And accordingly in 4 Car. I. on a reference to all the judges, concerning ſome very atrocious words ſpoken by one Pyne, they certified to the king, "that though the words were as wicked "as might be, yet they were no treaſon: for, unleſs it be "by ſome particular ſtatute, no words will be treaſon[y](4)." If the words be ſet down in writing, it argues more deliberate intention: and it has been held that writing is an overt act of treaſon; for *ſcribere eſt agere*. But even in this caſe the bare words are not the treaſon, but the deliberate act of writing them. And ſuch writing, though unpubliſhed, has in ſome arbitrary reigns convicted it's author of treaſon: particularly in the caſes of one Peachum, a clergyman, for treaſonable paſſages in a ſermon never preached[z]; and of Algernon Sydney, for ſome papers found in his cloſet; which, had they been plainly relative to any previous formed deſign of dethroning or murdering the king, might doubtleſs have been properly read in evidence as overt acts of that treaſon, which was ſpecially laid in the indictment[a]. [81] But being merely ſpeculative, without any intention (ſo far as appeared) of making any public uſe of them, the convicting the authors of treaſon upon ſuch an inſufficient foundation has been univerſally diſapproved. Peachum was therefore pardoned: and though Sydney indeed was executed,

[y] Cro. Car. 125. [z] *Ibid.* [a] Foſter. 198.

(4) This ſubject is fully and ably diſcuſſed by Mr. J. Foſter, who maintains that words alone cannot amount to an overt act of treaſon; but if they are attended or followed by a conſultation, meeting, or any act, then they will be evidence, or a confeſſion, of the intent of ſuch conſultation, meeting, or act; and he concludes, that "looſe words not relative to facts, are at the worſt no more "that bare indications of the malignity of the heart." *Foſt.* 202. *et ſeq.*

yet it was to the general diſcontent of the nation; and his attainder was afterwards reverſed by parliament. There was then no manner of doubt, but that the publication of ſuch a treaſonable writing was a ſufficient overt act of treaſon at the common law [b]; though of late even that has been queſtioned.

2. THE ſecond ſpecies of treaſon is, "if a man do vio- "late the king's companion, or the king's eldeſt daughter "unmarried, or the wife of the king's eldeſt ſon and heir." By the king's companion is meant his wife; and by violation is underſtood carnal knowlege, as well without force, as with it: and this is high treaſon in both parties, if both be conſenting; as ſome of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any ſuſpicion of baſtardy, whereby the ſucceſſion to the crown might be rendered dubious: and therefore, when this reaſon ceaſes, the law ceaſes with it; for to violate a queen or princeſs dowager is held to be no treaſon [c] (5): in like manner as, by the feodal law, it was a felony and attended with a forfeiture of the fief, if the vaſal vitiated the wife or daughter of his lord [d]; but not ſo, if he only vitiated his widow [e].

3. THE third ſpecies of treaſon is, "if a man do levy "war againſt our lord the king in his realm." And this

[b] 1 Hal. P. C. 118. 1 Hawk. P. C. 38.
[c] 3 Inſt. 9.
[d] *Feud. l.* 1. *t.* 5.
[e] *Ibid. t.* 21.

(5) But the inſtances ſpecified in the ſtatute do not prove much conſiſtency in the application of this reaſon; for there is no protection given to the wives of the younger ſons of the king, though their iſſue muſt inherit the crown before the iſſue of the king's eldeſt daughter, and her chaſtity is only inviolable before marriage, whilſt her children would be clearly illegitimate.

Before the 25 Ed. III. it was held to be high treaſon not only to violate the wife and daughters of the king, but alſo the nurſes of his children, *les norices de lour enfantz*. *Britt. c.* 8.

may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to remove evil counſellors, or other grievances whether real or [82] pretended [f] (6). For the law does not, neither can it, permit any private man, or ſet of men, to interfere forcibly in matters of ſuch high importance; eſpecially as it has eſtabliſhed a ſufficient power, for theſe purpoſes, in the high court of parliament: neither does the conſtitution juſtify any private or particular reſiſtance for private or particular grievances; though in caſes of national oppreſſion the nation has very juſtifiably riſen as one man, to vindicate the original contract ſubſiſting between the king and his people. To reſiſt the king's forces by defending a caſtle againſt them, is a levying of war: and ſo is an inſurrection with an avowed deſign to pull down *all* incloſures, *all* brothels, and the like; the univerſality of the deſign making it a rebellion againſt the ſtate, an uſurpation of the powers of government, and an inſolent invaſion of the king's authority [g]. But a tumult with a view to pull down a particular houſe, or lay open a particular incloſure, amount at moſt to a riot; this being no general defiance of public government. So, if two ſubjects quarrel and levy war againſt each other, (in that ſpirit of private war, which prevailed all over Europe [h] in the early feodal times,) it is only a great riot and contempt, and no treaſon. Thus it happened between the earls of Hereford and Gloceſter in 20 Edw. I. who raiſed each a little army, and committed outrages upon each other's lands, burning houſes, attended with the loſs of many lives: yet this was held to be no high treaſon, but only a great miſdemeſnor [i]. A bare conſpiracy to levy war does not amount to this ſpecies of

[f] 1 Hawk. P. C. 37.
[g] 1 Hal. P. C. 132.
[h] Robertſon Cha. V. i. 45. 286.
[i] 1 Hal. P. C. 136.

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(6) Lord Mansfield declared, upon the trial of lord George Gordon, that it was the unanimous opinion of the court, that an attempt, by intimidation and violence, to force the repeal a law, was a levying war againſt the king, and high treaſon. *Doug.* 570.

treaſon;

treaſon; but (if particularly pointed at the perſon of the king or his government) it falls within the firſt, of compaſſing or imagining the king's death [j].

4. "IF a man be adherent to the king's enemies in his "realm, giving to them aid and comfort in the realm, or "elſewhere," he is alſo declared guilty of high treaſon. This muſt likewiſe be proved by ſome overt act, as by giving them intelligence (7), by ſending them proviſions, by ſelling them arms, by treacherouſly ſurrendering a fortreſs, or the
[83] like [k]. By enemies are here underſtood the ſubjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coaſts, without any open hoſtilities between their nation and our own, and without any commiſſion from any prince or ſtate at enmity with the crown of Great Britain, the giving them any aſſiſtance is alſo clearly treaſon; either in the light of adhering to the public enemies of the king and kingdom [l], or elſe in that of levying war againſt his majeſty. And, moſt indiſputably, the ſame acts of adherence or aid, which (when applied to foreign enemies) will conſtitute treaſon under this branch of the ſtatute, will (when afforded to our own fellow-ſubjects in actual rebellion at home) amount to high treaſon under the deſcription of levying war againſt the king [m]. But to relieve a rebel, fled out of the kingdom, is

[j] 3 Inſt. 9. Foſter. 211. 213.
[k] 3 Inſt. 10.
[l] Foſter. 219.
[m] *Ibid.* 216.

(7) Sending intelligence to the enemy of the deſtinations and deſigns of this kingdom, in order to aſſiſt them in their operations againſt us, or in defence of themſelves, is high treaſon, although ſuch correſpondence ſhould be intercepted. Dr. Henſey's caſe, 1 *Burr.* 650.

The ſame doctrine was held by lord Kenyon and the court in the caſe of William Stone, who was tried at the bar of the court of king's bench in Hilary term 1796. In that caſe it was held, that ſending a paper to the enemy, though it was afterwards intercepted, containing advice not to invade this country, if ſent with the intention of aſſiſting their councils in their conduct and in the proſecution of the war, was high treaſon. 6 *T.R.* 527.

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no treaſon: for the ſtatute is taken ſtrictly, and a rebel is not an *enemy*; an enemy being always the ſubject of ſome foreign prince, and one who owes no allegiance to the crown of England [n]. And if a perſon be under circumſtances of actual force and conſtraint, through a well-grounded apprehenſion of injury to his life or perſon, this fear or compulſion will excuſe his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he hath a ſafe opportunity [o].

5. "IF a man counterfeit the king's great or privy ſeal," this is alſo high treaſon. But if a man takes wax bearing the impreſſion of the great ſeal off from one patent, and fixes it to another, this is held to be only an abuſe of the ſeal, and not a counterfeiting of it: as was the caſe of a certain chaplain, who in ſuch manner framed a diſpenſation for non-reſidence. But the knaviſh artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glewed together two pieces of parchment; on the uppermoſt of which he wrote a patent, to which he regularly obtained the great ſeal, the label going through both the ſkins. He then diſſolved the cement; and taking off the written patent, [84] on the blank ſkin wrote a freſh patent, of a different import from the former, and publiſhed it as true. This was held no counterfeiting of the great ſeal, but only a great miſpriſion; and ſir Edward Coke [p] mentions it with ſome indignation, that the party was living at that day.

6. THE ſixth ſpecies of treaſon under this ſtatute, is "if "a man counterfeit the king's money; and if a man bring "falſe money into the realm counterfeit to the money of "England, knowing the money to be falſe, to merchan-"dize and make payment withal." As to the firſt branch, counterfeiting the king's money; this is treaſon, whether the falſe money be uttered in payment or not. Alſo if the king's own minters alter the ſtandard or alloy eſtabliſhed by law, it is treaſon. But gold and ſilver money only are held

[n] 1 Hawk. P. C. 38. [o] Foſter. 216. [p] 3 Inſt. 16.

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to be within the ſtatute [q]. With regard likewiſe to the ſecond branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the ſtatute [r]. But of this we ſhall preſently ſay more.

7. THE laſt ſpecies of treaſon aſcertained by this ſtatute, is "if a man ſlay the chancellor, treaſurer, or the king's "juſtices of the one bench or the other, juſtices in eyre, or "juſtices of aſſiſe, and all other juſtices aſſigned to hear and "determine, being in their places doing their offices." Theſe high magiſtrates, as they repreſent the king's majeſty during the execution of their offices, are therefore for the time equally regarded by the law. But this ſtatute extends only to the actual killing of them, and not wounding, or a bare attempt to kill them. It extends alſo only to the officers therein ſpecified; and therefore the barons of the exchequer, as ſuch, are not within the protection of this act [s]: but the lord keeper or commiſſioners of the great ſeal now ſeem to be within it, by virtue of the ſtatutes 5 Eliz. c. 18. and 1 W. & M. c. 21. (8)

[85] THUS careful was the legiſlature, in the reign of Edward the third, to ſpecify and reduce to a certainty the vague no-

[q] 1 Hawk. P. C. 42. [r] *Ibid.* 43. [s] 1 Hal. P. C. 231.

(8) By the ſtatute 7 Ann. c. 21. it is made high treaſon to ſlay any of the lords of ſeſſion, or lords of juſticiary, ſitting in judgment; or to counterfeit the king's ſeals appointed by the act of union. This ſtatute 7 Ann. c. 21. has alſo enacted that the crimes of high treaſon and miſpriſion of treaſon ſhall be exactly the ſame in England and Scotland; and that no acts in Scotland, except thoſe above ſpecified, ſhall be conſtrued high treaſon in Scotland, which are not high treaſon in England.

And all perſons proſecuted in Scotland for high treaſon, or miſpriſion of treaſon, ſhall be tried by a jury, and in the ſame manner as if they had been proſecuted for the ſame crime in England.

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tions of treaſon, that had formerly prevailed in our courts. But the act does not ſtop here, but goes on. "Becauſe "other like caſes of treaſon may happen in time to come, "which cannot be thought of nor declared at preſent, it is "accorded, that if any other cauſe ſuppoſed to be treaſon, "which is not above ſpecified, doth happen before any "judge; the judge ſhall tarry without going to judgment of "the treaſon, till the cauſe be ſhewed and declared before "the king and his parliament, whether it ought to be judg-"ed treaſon, or other felony." Sir Matthew Hale [t] is very high in his encomiums on the great wiſdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not ſuffering them to run out (upon their own opinions) into conſtructive treaſons, though in caſes that ſeem to them to have a like parity of reaſon; but reſerving them to the deciſion of parliament. This is a great ſecurity to the public, the judges, and even this ſacred act itſelf; and leaves a wighty *memento* to judges to be careful and not overhaſty in letting in treaſons by conſtruction or interpretation, eſpecially in new caſes that have not been reſolved and ſettled. 2. He obſerves, that as the authoritative deciſion of theſe *caſus omiſſi* is reſerved to the king and parliament, the moſt regular way to do it is by a new declarative act: and therefore the opinion of any one or of both houſes, though of very reſpectable weight, is not that ſolemn declaration referred to by this act, as the only criterion for judging of future treaſons.

In conſequence of this power, not indeed originally granted by the ſtatute of Edward III. but conſtitutionally inherent in every ſubſequent parliament, (which cannot be abridged of any rights by the act of a precedent one,) the legiſlature was extremely liberal in declaring new treaſons in the unfortunate reign of king Richard the ſecond; as, particularly, the killing of an embaſſador was made ſo; which ſeems to be founded upon better reaſon than the mul-

[t] 1 Hal. P. C. 259.

titude of other points, that were then ſtrained up to this high offence: the moſt arbitrary and abſurd of all which was by the ſtatute 21 Ric. II. c. 3. which made the bare purpoſe and intent of killing or depoſing the king, without any overt act to demonſtrate it, high treaſon. And yet ſo little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both depoſed and murdered. And in the firſt year of his ſucceſſor's reign, an act was paſſed [u], reciting, "that no man knew "how he ought to behave himſelf, to do, ſpeak, or ſay, for "doubt of ſuch pains of treaſon: and therefore it was ac- "corded, that in no time to come any treaſon be judged "otherwiſe than was ordained by the ſtatute of king Ed- "ward the third." This at once ſwept away the whole load of extravagant treaſons introduced in the time of Richard the ſecond.

BUT afterwards, between the reign of Henry the fourth and queen Mary, and particularly in the bloody reign of Henry the eighth, the ſpirit of inventing new and ſtrange treaſons was revived; among which we may reckon the offences of clipping money; breaking priſon or reſcue, when the priſoner is committed for treaſon; burning houſes to extort money; ſtealing cattle by Welchmen; counterfeiting foreign coin; wilful poiſoning; execrations againſt the king; calling him opprobrious names by public writing; counterfeiting the ſign manual or ſignet; refuſing to abjure the pope; deflowering or marrying, without the royal licence, any of the king's children, ſiſters, aunts, nephews, or nieces; bare ſolicitation of the chaſtity of the queen or princeſs, or advances made by themſelves; marrying with the king, by a woman not a virgin, without previouſly diſcovering to him ſuch her unchaſte life; judging or *believing* (manifeſted by any overt act) the king to have been lawfully married to Anne of Cleve; derogating from the king's royal ſtile and title; impugning his ſupremacy; and aſſembling riotouſly to the number of twelve, and not diſperſing upon proclamation: all which new-fangled treaſons were totally abrogated by the

[u] Stat. 1 Hen. IV. c. 10.

ſtatute

ſtatute 1 Mar. c. 1. which once more reduced all treaſons to the ſtandard of the ſtatute 25 Edw. III. Since which time, though the legiſlature has been more cautious in creating new offences of this kind; yet the number is very conſiderably increaſed, as we ſhall find upon a ſhort review.

THESE new treaſons, created ſince the ſtatute 1 Mar. c. 1. and not comprehended under the deſcription of ſtatute 25 Edw. III. I ſhall comprize under three heads. 1. Such as relate to papiſts. 2. Such as relate to falſifying the coin or other royal ſignatures. 3. Such as are created for the ſecurity of the proteſtant ſucceſſion in the houſe of Hanover.

1. THE firſt ſpecies, relating to *papiſts*, was conſidered in a preceding chapter, among the penalties incurred by that branch of non-conformiſts to the national church; wherein we have only to remember, that by ſtatute 5 Eliz. c. 1. to defend the pope's juriſdiction in this realm is, for the firſt time, a heavy miſdemeſnor: and, if the offence be repeated, it is high treaſon. Alſo by ſtatute 27 Eliz. c. 2. if any popiſh prieſt, born in the dominions of the crown of England, ſhall come over hither from beyond the ſeas, unleſs driven by ſtreſs of weather[w], and departing in a reaſonable time[x]; or ſhall tarry here three days without conforming to the church, and taking the oaths; he is guilty of high treaſon. And by ſtatute 3 Jac. I. c. 4. if any natural-born ſubject be withdrawn from his allegiance, and reconciled to the pope or ſee of Rome, or any other prince or ſtate, both he and all ſuch as procure ſuch reconciliation ſhall incur the guilt of high treaſon. Theſe were mentioned under the diviſion before referred to, as ſpiritual offences, and I now repeat them as temporal ones alſo; the reaſon of diſtinguiſhing theſe overt-acts of popery from all others, by ſetting the mark of high treaſon upon them, being certainly on a civil, and not on a religious, account. For every popiſh prieſt of courſe renounces his allegiance to his temporal ſovereign upon taking orders; that being inconſiſtent with his new engagements of

[w] Sir T. Raym. 377. [x] Latch. 1.

canonical obedience to the pope: and the ſame may be ſaid of an obſtinate defence of his authority here, or a formal re-
[88] conciliation to the ſee of Rome, which the ſtatute conſtrues to be a withdrawing from one's natural allegiance; and therefore, beſides being reconciled "to the pope," it alſo adds "or any other prince or ſtate (9)."

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(9) In conſequence of inſults and outrages, which had been publicly offered to the perſon of the king, and of the great multitude of ſeditious publications aiming at the overthrow of the government of this country, and alſo of the frequent ſeditious meetings and aſſemblies held at that time to deſtroy the ſecurity and tranquillity of the public, two acts of parliament were paſſed in the 36th year of his preſent Majeſty's reign, one intitled "An act "for the ſafety and preſervation of his Majeſty's perſon and go-"vernment againſt treaſonable and ſeditious practices and at-"tempts;" and the other, "An act for the more effectually pre-"venting ſeditious meetings and aſſemblies."

By the firſt it was enacted, that if any perſon ſhould compaſs, imagine, or intend death, deſtruction, or any bodily harm to the perſon of the king, or to depoſe him, or to levy war in order by force to compel him to change his meaſures or counſels, or to overawe either houſe of parliament, or to excite an invaſion of any of his Majeſty's dominions, and ſhall expreſs and declare ſuch intentions by printing, writing, or any overt-act, he ſhall ſuffer death as a traitor.

And if any one by writing, printing, preaching, or other ſpeaking, ſhall uſe any words or ſentences to incite the people to hatred and contempt of the king, or of the government and conſtitution of this realm, he ſhall incur the puniſhment of a high miſdemeanor; that is, fine, impriſonment, and pillory: and for a ſecond offence he is ſubject to a ſimilar puniſhment, or tranſportation for ſeven years at the diſcretion of the Court.

But a proſecution for a miſdemeanor under this act muſt be brought within ſix months. And this ſtatute ſhall not effect any proſecution for the ſame crimes by the common law, unleſs a proſecution be previouſly commenced under the ſtatute. This ſtatute is to continue in force until the end of the next ſeſſion of parliament after the demiſe of the crown. 36 *Geo. III. c.* 7.

The other ſtatute, for the ſuppreſſion of ſeditious meetings, enacts, that no meeting exceeding the number of fifty perſons ſhall be holden

2. WITH regard to treaſons relative to the *coin* or other *royal ſignatures*, we may recollect that the only two offences

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holden for the purpoſe of any petition or remonſtrance to the king or either houſe of parliament, for the alteration of any matters eſtabliſhed in church or ſtate, or for the purpoſe of deliberating upon any grievance in the ſame, unleſs notice of ſuch a meeting be given in the names of ſeven houſeholders in ſome public newſpaper five days at the leaſt before the meeting; and every publiſher of a newſpaper, who advertiſes ſuch a meeting without ſuch a notice as is particularly deſcribed in the ſtatute, ſhall forfeit the ſum of 50*l.*

Or inſtead of being inſerted in a newſpaper, it may be ſent five days before the meeting to the clerk of the peace of the county, who ſhall immediately tranſmit a copy of it to three juſtices of the peace reſident within the county. But all meetings, without ſuch previous notice, conſiſting of more than fifty perſons, aſſembled for the aforeſaid purpoſes, ſhall be unlawful aſſemblies: and if, after a proclamation made by a magiſtrate to diſperſe, more than twelve continue together, they will be guilty of a capital felony. And if, in a meeting held purſuant to notice, it ſhall either be propoſed in the notice, or any one ſhall propoſe at the meeting, to alter without authority of parliament any matter eſtabliſhed by law, or make any propoſition to excite hatred againſt the king, or the conſtitution, then one or more juſtices may order the aſſembly to diſperſe, and may order the perſons who made ſuch propoſitions to be taken into cuſtody. And every perſon who ſhall obſtruct any magiſtrate in the diſcharge of his duty in enforcing the directions of this ſtatute, ſhall ſuffer death without benefit of clergy.

The magiſtrates in Scotland have the ſame authority as juſtices of the peace in England. And if any perſon ſhall open a houſe where lectures ſhall be read upon public grievances, or the laws and government of theſe kingdoms, to which perſons ſhall be admitted for money, ſuch houſe, unleſs previouſly licenſed, ſhall be conſidered a diſorderly houſe; and the perſon by whom it is opened ſhall forfeit 100.*l*; and all other perſons concerned, as the preſident or chairman at ſuch lectures, or all who ſhall pay or receive money for admiſſion, or who ſhall deliver out tickets, ſhall alſo forfeit the ſame ſum. But two juſtices may grant a licence to read ſuch lectures, which ſhall continue in force for one year, unleſs ſooner revoked by the juſtices at the quarter-ſeſſions. But this ſtatute does not extend to lectures delivered in the univer-

reſpecting the coinage, which are made treaſon by the ſtatute 25 Edw. III, are the actual counterfeiting the gold and ſilver coin of this kingdom; or the importing ſuch counterfeit money with intent to utter it, knowing it to be falſe. But theſe not being found ſufficient to reſtrain the evil practices of coiners and falſe moneyers, other ſtatutes have been ſince made for that purpoſe. The crime itſelf is made a ſpecies of high treaſon; as being a breach of allegiance, by infringing the king's prerogative, and aſſuming one of the attributes of the ſovereign, to whom alone it belongs to ſet the value and denomination of coin made at home, or to fix the currency of foreign money: and beſides, as all money which bears

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ſities, or to diſcourſes given by ſchool-maſters to their ſcholars. Proſecutions and actions under this ſtatute to be commenced within three months after the offence. 36 *Geo. III. c.* 8.

This laſt ſtatute was a temporary act, and at the concluſion of the peace with France was ſuffered to expire.

The ſeditious meetings which were held before the paſſing of this ſtatute were in fact temporary inſurrections, and a ſcandal to any regular government; and however vehement the arguments of ſome, but principally of thoſe whom they were intended to reſtrain, that public liberty was endangered, yet it ought to be remembered that public liberty cannot exiſt without public ſecurity. The antient conſtitutional meetings for the inveſtigation of public affairs, with which our forefathers were contented, were not in the ſmalleſt degree affected by this ſtatute. A public meeting might at any time be called to take into conſideration the ſtate of the nation or the conduct of the King's miniſters by a lord lieutenant, *cuſtos rotulorum*, ſheriff of a county, a convener of a county or ſtewartry in Scotland, two juſtices of the peace, the major part of a grand jury either at the aſſizes or quarter-ſeſſions, the mayor or head officer of any city or town corporate, or the alderman or head officer of any ward or diviſion, or any corporate body. All theſe might in their reſpective juriſdictions call public meetings, which had the ſame uncontrolled power of diſcuſſion as they had before the ſtatute. Could then any wiſe and well-intentioned Engliſhman ſay that his liberty was violated by this valuable ſtatute?

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the ſtamp of the kingdom is ſent into the world upon the public faith, as containing metal of a particular weight and ſtandard, whoever falſifies this is an offender againſt the ſtate, by contributing to render that public faith ſuſpected. And upon the ſame reaſons, by a law of the emperor Conſtantine [y], falſe coiners were declared guilty of high treaſon, and were condemned to be burnt alive: as, by the laws of Athens [z], all counterfeiters, debaſers, and diminiſhers of the current coin were ſubjected to capital puniſhment. However, it muſt be owned, that this method of reaſoning is a little overſtrained: counterfeiting or debaſing the coin being uſually practiſed, rather for the ſake of private and unlawful lucre, than out of any diſaffection to the ſovereign. And therefore both this and its kindred ſpecies of treaſon, that of counterfeiting the ſeals of the crown or other royal ſignatures, ſeem better denominated by the later civilians a branch of the *crimen falſi* or forgery, (in which they are followed by Glanvil [a], Bracton [b], and Fleta [c],) than by Conſtantine and our [89] Edward the third, a ſpecies of the *crimen laeſae majeſtatis* or high treaſon. For this confounds the diſtinction and proportion of offences; and, by affixing the ſame ideas of guilt upon the man who coins a leaden groat and him who aſſaſſinates his ſovereign, takes off from that horror which ought to attend the very mention of the crime of high treaſon, and makes it more familiar to the ſubject. Before the ſtatute 25 Edw. III. the offence of counterfeiting the coin was held to be only a ſpecies of petit treaſon [d]; but ſubſequent acts in their new extenſions of the offence have followed the example of that ſtatute, and have made it equally high treaſon with an endeavour to ſubvert the government, though not quite equal in it's puniſhment.

In conſequence of the principle thus adopted, the ſtatute 1 Mar. c. 1. having at one ſtroke repealed all intermediate

y *C.* 9. 24. 2. *Cod. Theod. de falſa moneta. l.* 9.
z Pott. Ant. b. 1. c. 26.
a *l.* 14. *c.* 7.
b *l.* 3. *c.* 3. § 1 & 2.
c *l.* 1. *c.* 22.
d 1 Hal. P. C. 224.

treaſons created ſince the 25 Edw. III. it was thought expedient by ſtatute 1 Mar. ſt. 2. c. 6. to revive two ſpecies thereof; *viz.* 1. That if any perſon falſely forge or counterfeit any ſuch kind of coin of gold or ſilver, as is not the proper coin of this realm, but ſhall be current within this realm by conſent of the crown; or, 2. ſhall falſely forge or counterfeit the ſign manual, privy ſignet, or privy ſeal; ſuch offences ſhall be deemed high treaſon. And by ſtatute 1 & 2 P. & M. c. 11. if any perſons do bring into this realm ſuch falſe or counterfeit foreign money, being current here, knowing the ſame to be falſe, with intent to utter the ſame in payment, they ſhall be deemed offenders in high treaſon. The money referred to in theſe ſtatutes muſt be ſuch as is abſolutely current here, in all payments, by the king's proclamation; of which there is none at preſent, Portugal money being only taken by conſent, as approaching the neareſt to our ſtandard: and falling in well enough with our diviſions of money into pounds and ſhillings: therefore to counterfeit it is not high treaſon, but another inferior offence(10). Clipping or defacing the genuine coin was not hitherto included in theſe ſtatutes; though an offence equally pernicious to trade, and an equal

(10) But now by the 37 Geo. III. c. 126. if any perſon ſhall coin or counterfeit any kind of foreign gold or ſilver coin, though not current within this realm, he ſhall be guilty of felony, and may be tranſported for ſeven years; and if any perſon knowingly and fraudulently ſhall bring any counterfeit coin into the kingdom, he ſhall be ſubject to the ſame puniſhment.

And if any perſon knowingly utter, or tender in payment, or pay any ſuch counterfeit foreign coin, for the firſt offence he ſhall be impriſoned ſix months, and find ſureties for his good behaviour for ſix more; for the ſecond offence he ſhall be impriſoned two years; and for the third he ſhall be guilty of a capital felony.

And if any perſon without lawful excuſe ſhall have more than five ſuch counterfeit pieces in his cuſtody, he may be convicted before a juſtice, and forfeit from 40*s.* to 5*l.* for each piece, and for failure of payment may be impriſoned three months.

insult upon the prerogative, as well as personal affront to the sovereign; whose very image ought to be had in reverence by all loyal subjects. And therefore, among the Romans[e], defacing or even melting down the emperor's statues was made treason by the Julian law; together with other offences of the like sort, according to that vague conclusion, "*aliudve quid simile si admiserint.*" And now, in England, by statute 5 Eliz. c. 11. clipping, washing, rounding, or filing, for wicked gain's sake, any of the money of this realm, or other money suffered to be current here, shall be adjudged high treason; and by statute 18 Eliz. c. 1. (because "the same law, being penal, ought to be taken and expounded "strictly according to the words thereof, and the like offences, not by any equity to receive the like punishment or "pains") the same species of offence is therefore described in other more general words; *viz.* impairing, diminishing, falsifying, scaling, and lightening; and made liable to the same penalties. By statute 8 & 9 W. III. c. 26. made perpetual by 7 Ann. c. 25. whoever, without proper authority, shall knowingly make or mend, or assist in so doing, or shall buy, sell, conceal, hide, or knowingly have in his possession, any implements of coinage specified in the act, or other tools or instruments proper only for the coinage of money; or shall convey the same out of the king's mint; he, together with his counsellors, procurers, aiders, and abettors, shall be guilty of high treason: which is by much the severest branch of the coinage law. The statute goes on farther, and enacts, that to mark any coin on the edges with letters, or otherwise, in imitation of those used in the mint; or to colour, gild, or case over any coin resembling the current coin, or even round blanks of base metal; shall be construed high treason. But all prosecutions on this act are to be commenced within *three* months after the commission of the offence: except those for making or amending any coining tool or instrument, or for marking money round the edges; which are directed to be commenced within *six*

[e] *Ff.* 48. 4. 6.

months

months after the offence committed[f] (11). And, laſtly, by ſtatute 15 & 16 Geo. II. c. 28. if any perſon colours or alters any ſhilling or ſixpence, either lawful or counterfeit,
[91] to make them reſpectively reſemble a guinea or half-guinea; or any halfpenny or farthing to make them reſpectively reſemble a ſhilling or ſixpence; this is alſo high treaſon: but the offender ſhall be pardoned, in caſe (being out of priſon) he diſcovers and convicts two other offenders of the ſame kind.

3. THE other new ſpecies of high treaſon is ſuch as is created for the ſecurity of the *proteſtant ſucceſſion* over and above ſuch treaſons againſt the king and government as were comprized under the ſtatute 25 Edw. III. For this purpoſe, after the act of ſettlement was made, for transferring the crown to the illuſtrious houſe of Hanover, it was enacted by ſtatute 13 & 14 W. III. c. 3. that the pretended prince of

[f] Stat. 7 Ann. c. 25.

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(11) If a perſon is apprehended in the act of coining, or is proved to have made a conſiderable progreſs in making counterfeit pieces reſembling the gold or ſilver coin of this realm, yet if they are ſo imperfect as that no one would take them, he cannot be convicted upon the charge of coining under this ſtatute. *Leach*, 71. 126. But he may be convicted, if he has made blank pieces without any impreſſion to the ſimilitude of ſilver coin worn ſmooth by time. *Welch's caſe*, Ibid. 293.

Or if any one ſhall put pieces of mixed metal into aqua fortis, which attracts the baſer metal and leaves the ſilver upon the ſurface, or as the vulgar ſay draws out the ſilver, this is held to be colouring under this ſtatute. *Lavey's caſe*, Ibid. 140.

In a caſe at Durham where a man had been committed more than three months before his trial for coining under this ſtatute, and upon conviction his caſe was reſerved for the opinion of the judges, they determined that the commitment was the commencement of the proſecution, otherwiſe this crime might be committed with impunity half the year in the four northern counties.

Wales, who was then thirteen years of age, and had assumed the title of king James III. should be attainted of high treason; and it was made high treason for any of the king's subjects, by letters, messages, or otherwise, to hold correspondence with him, or any person employed by him, or to remit any money for his use, knowing the same to be for his service. And by statute 17 Geo. II. c. 39. it is enacted, that if any of the sons of the pretender shall land or attempt to land in this kingdom, or be found in Great Britain, or Ireland, or any of the dominions belonging to the same, he shall be judged attainted of high treason, and suffer the pains thereof. And to correspond with them, or to remit money for their use, is made high treason in the same manner as it was to correspond with the father. By the statute 1 Ann. st. 2. c. 17. if any person shall endeavour to deprive or hinder any person, being the next in succession to the crown according to the limitations of the act of settlement, from succeeding to the crown, and shall maliciously and directly attempt the same by any overt act, such offence shall be high treason. And by statute 6 Ann. c. 7. if any person shall maliciously, advisedly, and directly, by writing or printing, maintain and affirm, that any other person hath any right or title to the crown of this realm, otherwise than according to the act of settlement; or that the kings of this realm with the authority of parliament are not able to make laws and statutes, to bind the crown and the descent thereof; such person shall [92] be guilty of high treason. This offence (or indeed maintaining this doctrine in any wise, that the king and parliament cannot limit the crown) was once before made high treason, by statute 13 Eliz. c. 1. during the life of that princess. And after her decease it continued a high misdemesnor, punishable with forfeiture of goods and chattels, even in the most flourishing aera of indefeasible hereditary right and *jure divino* succession. But it was again raised into high treason, by the statute of Anne before-mentioned, at the time of a projected invasion in favour of the then pretender; and upon this statute one Matthews, a printer, was convicted

victed and executed in 1719, for printing a treasonable pamphlet intitled "*vox populi vox Dei*[g]."

THUS much for the crime of treason, or *laesae majestatis*, in all it's branches; which consists, we may observe, originally, in grossly counteracting that allegiance, which is due from the subject by either birth or residence: though, in some instances, the zeal of our legislators to stop the progress of some highly pernicious practices has occasioned them a little to depart from this it's primitive idea. But of this enough has been hinted already: it is now time to pass on from defining the crime to describing it's punishment.

THE punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance[h], at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement[j].— 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal[i].

THE king may, and often doth, discharge all the punishment, except beheading, especially where any of noble
[39] blood are attainted. For, beheading being part of the judgment, that may be executed, though all the rest be omitted by the king's command[k]. But where beheading is no part of the judgment, as in murder or other felonies, it hath

[g] State Tr. IX. 680.
[h] 33 Ass. pl. 7.
[j] 1 Hal. P. C. 382.
[i] This punishment for treason, sir Edward Coke tells us, is warranted by divers examples in scripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and so of the rest. (3 Inst. 211.)
[k] 1 Hal. P. C. 351.

been

been ſaid that the king cannot change the judgment, although at the requeſt of the party, from one ſpecies of death to another [l]. But of this we ſhall ſay more hereafter [m].

IN the caſe of coining, which is a treaſon of a different complexion from the reſt, the puniſhment is milder for male offenders; being only to be drawn, and hanged by the neck till dead [n]. But in treaſons of every kind the puniſhment of women is the ſame, and different from that of men. For, as the decency due to the ſex forbids the expoſing and publicly mangling their bodies, their ſentence (which is to the full as terrible to ſenſation as the other) is to be drawn to the gallows, and there to be burned alive [o] (13).

THE conſequences of this judgment (attainder, forfeiture, and corruption of blood) muſt be referred to the latter end of this book, when we ſhall treat of them all together, as well in treaſon as in other offences.

[l] 3 Inſt. 52.
[m] See ch. 32.
[n] 1 Hal. P. C. 351.
[o] 2 Hal. P. C. 399.

(13) But now by the ſtatute 30 Geo. III. c. 48. women convicted in all caſes of treaſon, ſhall receive judgment to be drawn to the place of execution, and there to be hanged by the neck till dead.

CHAPTER THE SEVENTH.

OF FELONIES INJURIOUS TO THE KING's PREROGATIVE.

AS, according to the method I have adopted, we are next to conſider ſuch felonies as are more immediately injurious to the king's prerogative, it will not be amiſs here, at our firſt entrance upon this crime, to inquire briefly into the nature and meaning of *felony:* before we proceed upon any of the particular branches, into which it is divided.

FELONY, in the general acceptation of our Engliſh law, comprizes every ſpecies of crime, which occaſioned at common law the forfeiture of lands and goods. This moſt frequently happens in thoſe crimes, for which a capital puniſhment either is or was liable to be inflicted: for thoſe felonies which are called clergyable, or to which the benefit of clergy extends, were antiently puniſhed with death, in all lay, or unlearned offenders; though now by the ſtatute-law that puniſhment is for the firſt offence univerſally remitted. Treaſon itſelf, ſays ſir Edward Coke [a], was antiently comprized under the name of felony: and in confirmation of this we may obſerve, that the ſtatute of treaſons, 25 Edw. III. c. 2. ſpeaking of ſome dubious crimes, directs a reference to parliament;
[95] that it may be there adjudged, "whether they be treaſon, or "*other* felony." All treaſons therefore, ſtrictly ſpeaking, are felonies; though all felonies are not treaſon. And to this alſo we may add, that not only all offences, now capital, are in ſome degree or other felony; but that this is likewiſe the caſe

[a] 3 Inſt. 15.

with

with ſome other offences, which are not puniſhed with death; as ſuicide, where the party is already dead; homicide by chance-medley, or in ſelf-defence; and petit larceny, or pilfering; all which are (ſtrictly ſpeaking) felonies, as they ſubject the committers of them to forfeitures. So that upon the whole the only adequate definition of felony ſeems to be that which is before laid down; *viz.* an offence which occaſions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other puniſhment may be ſuperadded, according to the degree of guilt.

To explain this matter a little farther: the word *felony*, or *felonia*, is of undoubted feodal original, being frequently to be met with in the books of feuds, &c. but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the reſt: ſome deriving it from the Greek φηλος, an impoſtor or deceiver; others from the Latin, *fallo*, *fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a ſtill ſtranger etymology [b]; that it is *crimen animo felleo perpetratum*, with a bitter or galliſh inclination. But all of them agree in the deſcription, that it is ſuch a crime as occaſions a forfeiture of all the offender's lands, or goods. And this gives great probability to ſir Henry Spelman's Teutonic or German derivation of it [c]: in which language indeed, as the word is clearly of feodal original, we ought rather to look for it's ſignification, than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from two northern words; fee, which ſignifies (we well know) the fief, feud, or beneficiary eſtate: and lon, which ſignifies price or value. Felony is therefore the ſame as *pretium feudi*, the conſideration for which a man gives up his fief; as we ſay in common [96] ſpeech, ſuch an act is as much as your life, or eſtate, is worth. In this ſenſe it will clearly ſignify the feodal forfeiture or act by which an eſtate is forfeited, or eſcheats to the lord (1).

[b] 1 Inſt. 391. [c] Gloſſar. *tit. Felon.*

(1) But a forfeiture of land is not a neceſſary conſequence of felony; for petit larceny is felony, which does not produce a forfeiture

To confirm this we may obſerve, that it is in this ſenſe, of forfeiture to the lord, that the feodal writers conſtantly uſe it. For all thoſe acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold eſtates [d], are ſtiled *felonia* in the feodal law: "*ſcilicet, per* "*quas feudum amittitur* [e]." As, "*ſi domino deſervire nolue-*"*rit* [f]; *ſi per annum et diem ceſſaverit in petenda inveſtitura* [g]; "*ſi dominum ejuravit, i.e. negavit ſe a domino feudum habere* [h]; "*ſi a domino, in jus eum vocante, ter citatus non comparuerit* [i];" all theſe, with many others, are ſtill cauſes of forfeiture in our copyhold eſtates, and were denominated felonies by the feodal conſtitutions. So likewiſe injuries of a more ſubſtantial or criminal nature were denominated felonies, that is, forfeitures: as aſſaulting or beating the lord [k]; vitiating his wife or daughter, "*ſi dominum cucurbitaverit, i.e. cum uxore* "*ejus concubuerit* [l];" all theſe are eſteemed felonies, and the latter is expreſsly ſo denominated, "*ſi fecerit feloniam, do-*"*minum forte cucurbitando* [m]." And as theſe contempts, or ſmaller offences, were felonies or acts of forfeiture, of courſe greater crimes, as murder and robbery, fell under the ſame denomination. On the other hand, the lord might be guilty of felony, or forfeit his ſeignory to the vaſal, by the ſame acts as the vaſal would have forfeited his feud to the lord. "*Si dominus commiſit feloniam, per quam vaſallus amitteret feudum* "*ſi eam commiſerit in dominum, feudi proprietatem etiam dominus* "*perdere debet* [n]." One inſtance given of this ſort of felony in the lord is beating the ſervant of his vaſal, ſo as that he loſes his ſervice; which ſeems merely in the nature of a civil
[97] injury, ſo far as it reſpects the vaſal. And all theſe felonies were to be determined "*per laudamentum ſive judicium parium*

[d] See vol II. pag. 284.
[e] *Feud. l.* 2. *t.* 16. *in calc.*
[f] *Ibid. l.* 1. *t.* 21.
[g] *Ibid. l.* 2. *t* 24.
[h] *Ibid. l.* 2. *t.* 34. *l.* 2. *t.* 26. § 3.
[i] *Feud. l.* 2. *t.* 22.
[k] *Ibid. l.* 2. *t.* 24. § 2.
[l] *Ibid. l.* 1. *t.* 5.
[m] *Ibid. l.* 2. *t.* 38. *Britton. l.* 1. *c.* 22.
[n] *Feud. l.* 2. *t.* 26 & 47.

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feiture of lands; but every ſpecies of felony is followed by forfeiture of goods and perſonal chattels.

"*ſuorum*"

"*suorum*" in the lord's court; as with us forfeitures of copyhold lands are presentable by the homage in the court-baron.

FELONY, and the act of forfeiture to the lord, being thus synonymous terms in the feodal law, we may easily trace the reason why, upon the introduction of that law into England, those crimes which induced such forfeiture or escheat of lands (and, by a small deflection from the original sense, such as induced the forfeiture of goods also) were denominated felonies. Thus it was said, that suicide, robbery, and rape, were felonies; that is, the consequence of such crimes was forfeiture; till by long use we began to signify by the term of felony the actual crime committed, and not the penal consequence. And upon this system only can we account for the cause, why treason in antient times was held to be a species of felony; *viz.* because it induced a forfeiture.

HENCE it follows, that capital punishment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide, and petit larceny: and it is possible that capital punishments may be inflicted, and yet the offence be no felony; as in case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods[o], an inseparable incident to felony. And of the same nature was the punishment of standing mute, without pleading to an indictment; which at the common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short the true criterion of felony is forfeiture; for, as sir Edward Coke justly observes[p], in all felonies which are punishable with death, the offender loses all his lands in fee-simple, and also his goods and chattels; in such as are not so punishable, his goods and chattels only.

THE idea of felony is indeed so generally connected with [98] that of capital punishment, that we find it hard to separate

[o] 3 Inst. 43. [p] 1 Inst. 391.

them; and to this usage the interpretations of the law do now conform. And therefore if a statute makes any new offence felony, the law [q] implies that it shall be punished with death, *viz.* by hanging, as well as with forfeiture: unless the offender prays the benefit of clergy; which all felons are entitled once to have, provided the same is not expressly taken away by statute. And, in compliance herewith, I shall for the future consider it also in the same light, as a generical term, including all capital crimes below treason; having premised thus much concerning the true nature and original meaning of felony, in order to account for the reason of those instances I have mentioned, of felonies that are not capital, and capital offences that are not felonies: which seem at first view repugnant to the general idea which we now entertain of felony, as a crime to be punished by death: whereas properly it is a crime to be punished by forfeiture, and to which death may, or may not be, though it generally is, superadded.

I PROCEED now to consider such felonies, as are more immediately injurious to the king's prerogative. These are, 1. Offences relating to the coin, not amounting to treason. 2. Offences against the king's council. 3. The offence of serving a foreign prince. 4. The offence of imbezzling or destroying the king's armour or stores of war. To which may be added a fifth, 5. Desertion from the king's armies in time of war.

1. OFFENCES relating to the *coin*, under which may be ranked some inferior misdemesnors not amounting to felony, are thus declared by a series of statutes, which I shall recite in the order of time. And, first, by statute 27 Edw. I. c. 3. none shall bring pollards and crockards, which were foreign coins of base metal, into the realm on pain of forfeiture of life and goods. By statute 9 Edw. III. st. 2. no sterling money shall be melted down, upon pain of forfeiture thereof.
[99] By statute 17 Edw. III. none shall be so hardy to bring false and ill money into the realm, on pain of forfeiture of life

[q] 1 Hawk. P. C. 107. 2 Hawk. P. C. 444.

and

and member by the perſons importing, and the ſearchers permitting ſuch importation. By ſtatute 3 Hen. 5. ſt. 1. to make, coin, buy, or bring into the realm any gally-halfpence, ſuſkins, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or *blanks* [r] is forfeiture of an hundred ſhillings. By ſtatute 14 Eliz. c. 3. ſuch as forge any foreign coin, although it be not made current here by proclamation, ſhall (with their aiders and abettors) be guilty of miſpriſion of treaſon: a crime which we ſhall hereafter conſider. By ſtatute 13 & 14 Car. II. c. 31. the offence of melting down any current ſilver money ſhall be puniſhed with forfeiture of the ſame, and alſo the double value: and the offender, if a freeman of any town, ſhall be disfranchiſed; if not, ſhall ſuffer ſix months impriſonment. By ſtatute 6 & 7 W. III. c. 17. if any perſon buys or ſells, or knowingly has in his cuſtody, any clippings or filings of the coin, he ſhall forfeit the ſame and 500*l.*; one moiety to the king, and the other to the informer; and be branded in the cheek with the letter R. By ſtatute 8 & 9 W. III. c. 26. if any perſon ſhall blanch or whiten copper for ſale (which makes it reſemble ſilver); or buy or ſell or offer to ſale any malleable compoſition, which ſhall be heavier than ſilver, and look, touch, and wear like gold, but be beneath the ſtandard: or if any perſon ſhall receive or pay at a leſs rate than it imports to be of (which demonſtrates a conſciouſneſs of it's baſeneſs, and a fraudulent deſign) any counterfeit or diminiſhed milled money of this kingdom, not being cut in pieces (2); an ope-

[r] Stat. 2 Hen. VI. c. 9.

(2) Selling baſe and counterfeit money at a lower rate than it's denomination imports, as twenty bad half crowns for a guinea, is a crime of great magnitude, and in populous towns is much practiſed. The offender in this caſe is either the coiner himſelf, or the wholeſale dealer between the coiner and the utterer, who puts each piece into circulation at it's full apparent value. The ſtatute declares that the offender ſhall *ſuffer death as in caſe of felony;* but not having expreſsly taken away the benefit of clergy, for the firſt offence he was ſubject only to be burnt in the hand, and to ſuffer

ration which is expreſsly directed to be performed when any ſuch money ſhall be produced in evidence, and which any

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one year's impriſonment; and ſince the 19 Geo. III. c. 74. the burning in the hand may be changed by the court into a fine, or whipping publicly or privately, but not more than three times. An offender of this deſcription muſt neceſſarily be ſo converſant with coining or coiners that public policy requires that in the firſt inſtance he ſhould be ſent out of the kingdom.

It has been determined that the term *milled money*, does not mean edged money, or money marked on the edges.

The word *milled* ſeems to be ſuperfluous, and to ſignify nothing more than coined money. *Running's caſe*, *Leach*, 708.

In a caſe where the priſoner had counted out a quantity of bad money, and placed it upon a table for a perſon who had agreed to buy it, but before it was paid for, and whilſt it lay upon the table, the priſoner was apprehended, it was held that he had not *paid it* or *put it off*, ſo as to be guilty of this crime. *Wooldridge's caſe*, *Leach*, 251.

But in this caſe, he certainly might have been proſecuted for a miſdemeanour; for every attempt to commit either a felony or a miſdemeanour is a miſdemeanour. *R.* v. *Scofield*, *Cald.* 397.

In the year 1750, an indictment was preferred againſt a man for having in his cuſtody counterfeit money, knowing it to be counterfeit, with intention to pay the ſame away as true and lawful money: he was convicted upon clear evidence; but Mr. Juſtice Denniſon, doubting whether this was an indictable offence, as no notice was taken of it in the 15 & 16 Geo. II. c. 28, reſerved the queſtion for the judges, but it never was decided.—It is very extraordinary that there have been no proſecutions for this offence, eſpecially ſince the law of miſdemeanour became elucidated by the important caſe of *R.* v. *Scofield*.

The 15 & 16 Geo. II. c. 28. created no new offence, the preamble expreſsly ſtates that uttering falſe money was then a miſdemeanour. All that is new in the ſtatute is the ſpecific puniſhments for the different degrees of this miſdemeanour, which, after two convictions, becomes a felony. But an attempt to commit this miſdemeanour muſt be a miſdemeanour.

The *R.* v. *Sutton*, 2 *Str.* 1074. which is the baſis of the caſes, *R.* v. *Scofield*, and *R.* v. *Higgins*, 2 *Eaſt.* 5. is preciſely in point upon this ſubject. A man was convicted of a miſdemeanour, for having

perſon, to whom any gold or ſilver money is tendered, is empowered by ſtatutes 9 & 10 W. III. c. 21. 13 Geo. III. c. 71. and 14 Geo. III. c. 70. to perform at his own hazard, and the officers of the exchequer and receivers general of the taxes are particularly required to perform: all ſuch perſons ſhall be guilty of felony; and may be proſecuted for the ſame at any time within three months after the offence committed. But theſe precautions not being found ſufficient to prevent [100]

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having in his poſſeſſion two iron ſtamps, with intent to impreſs the ſceptres on ſixpences. The court, after hearing two arguments, declared, "the intent is the offence, and the having in his "cuſtody an act that is the evidence of that intent."

This caſe is much more fully reported in *Caſes in the Time of Lord Hardwicke*, 370.; and there it appears that one count was for having in his cuſtody a counterfeit half-guinea, with intent to utter it. The court take no notice of that count in their judgment. But in the argument four indictments are cited, for unlawfully procuring falſe money with intent to utter it, and with intent to defraud the people of England.

It cannot now be doubted but ſuch an indictment would be ſuſtained; and it would be of much greater importance to the public than any proſecution under the ſtatute; for perſons are frequently apprehended with a load of counterfeit money, who cannot be proved to have uttered any. Theſe are the wholeſale dealers, and the fitteſt objects of puniſhment, which need not be confined within the limits of the ſtatute.

The words in the ſtatute 15 & 16 Geo. II. are "ſhall utter, or "tender in payment;" and it has been decided that the words *in payment* refer to the word *tender* only, ſo that to tender in payment is one offence, and to utter another; and a man was convicted of *uttering*, who having received a good ſhilling, immediately changed it, and gave back a bad one, inſiſting it was the one he received. *Franks's caſe*, *Leach*, 736.

If a man is proſecuted for having uttered, or tendered in payment, any falſe money, and for having done the ſame within ten days afterwards, theſe two acts muſt be charged in one count. *Tandy's caſe*, *Leach*, 970.

But it is not neceſſary to aver in ſuch count, that the defendant was a common utterer of falſe money. *Smith's caſe*, *Ib.* 1001.

the uttering of falſe or diminiſhed money, which was only a miſdemeſnor at common law, it is enacted by ſtatute 15 & 16 Geo. II. c. 28. that if any perſon ſhall utter or tender in payment any counterfeit coin, knowing it ſo to be, he ſhall for the firſt offence be impriſoned ſix months, and find ſureties for his good behaviour for ſix months more: for the ſecond offence, ſhall be impriſoned two years, and find ſureties for two years longer: and, for the third offence, ſhall be guilty of felony without benefit of clergy. Alſo if a perſon knowingly tenders in payment any counterfeit money, and at the ſame time has more in his cuſtody; or ſhall, within ten days after, knowingly tender other falſe money; he ſhall be deemed a common utterer of counterfeit money, and ſhall for the firſt offence be impriſoned one year, and find ſureties for his good behaviour for two years longer; and for the ſecond, be guilty of felony without benefit of clergy. By the ſame ſtatute it is alſo enacted, that if any perſon counterfeits the copper coin, he ſhall ſuffer two years impriſonment, and find ſureties for two years more. By ſtatute 11 Geo. III. c. 40. perſons counterfeiting copper halfpence or farthings, with their abettors; or buying, ſelling, receiving, or putting off any counterfeit copper money (not being cut in pieces or melted down) at a leſs value than it imports to be of; ſhall be guilty of ſingle felony (3). And by a temporary ſtatute (14 Geo. III. c. 42.) if any quantity of money, exceeding the ſum of five pounds, being or purporting to be the ſilver coin of this realm, but below the ſtandard of the mint in weight or fineneſs, ſhall be imported into Great Britain or Ireland, the ſame ſhall be forfeited in equal moieties

(3) The 15 & 16 Geo. II. c. 28. and the 11 Geo. III. c. 40. ſpecify *halfpence* and *farthings* only; but other pieces of copper money having been ſince coined, the proviſions of thoſe ſtatutes by the 37 Geo. III. c. 126. are extended to all other pieces of copper money which are ordered to be current by the king's proclamation.

to

to the crown and profecutor (4). Thus much for offences relating to the coin, as well misdemesnors as felonies, which I thought it most convenient to consider in one and the same view.

2. FELONIES, against the king's *council*[s], are these. First, by statute 3 Hen. VII. c. 14. if any sworn servant of the king's household conspires or confederates to kill any lord of this realm, or other person, sworn of the king's council, he [101] shall be guilty of felony. Secondly, by statute 9 Ann. c. 16. to assault, strike, wound, or attempt to kill, any privy counsellor in the execution of his office, is made felony without benefit of clergy.

3. FELONIES in *serving foreign states*, which service is generally inconsistent with allegiance to one's natural prince, are restrained and punished by statute 3 Jac. I. c. 4. which makes it felony for any person whatever to go out of the realm, to serve any foreign prince, without having first taken the oath of allegiance before his departure. And it is felony also for any gentleman, or person of higher degree, or who hath borne any office in the army, to go out of the realm to serve such foreign prince or state, without previously entering into a bond with two sureties, not to be reconciled to the see of Rome, or enter into any conspiracy against his natural sovereign. And farther, by statute 9 Geo. II. c. 30. enforced by statute 29 Geo. II. c. 17. if any subject of Great Britain shall enlist himself, or if any person shall procure him to be enlisted, in any foreign service, or detain or embark him for that purpose, without licence under the king's sign manual, he shall be guilty of felony without benefit of clergy: but if the person, so enlisted or enticed, shall discover his seducer within fifteen days, so as he may be apprehended and con-

[s] See Vol. I. pag. 334.

(4) This statute, by the 39 Geo. III. c. 74. is revived and made perpetual.

victed of the same, he shall be indemnified. By statute 29 Geo. II. c. 17. it is moreover enacted, that to serve under the French king, as a military officer, shall be felony without benefit of clergy; and to enter into the Scotch brigade in the Dutch service, without previously taking the oaths of allegiance and abjuration, shall be a forfeiture of 500 *l.*

4. FELONY by *imbezzling* or *destroying* the king's *armour* or warlike *stores*, is, in the first place, so declared to be by statute 31 Eliz. c. 4. which enacts, that if any person having the charge or custody of the king's armour, ordnance, ammunition, or habiliments of war; or of any victual provided for victualling the king's soldiers or mariners; shall, either for gain, or to impede his Majesty's service, imbezzle the same
[102] to the value of twenty shillings, such offence shall be felony. And the statute 22 Car. II. c. 5. takes away the benefit of clergy from this offence, and from stealing the king's naval stores to the value of twenty shillings; with a power for the judge, after sentence, to transport the offender for seven years. Other inferior imbezzlements and misdemesnors, that fall under this denomination, are punished by statutes 9 & 10 W. III. c. 41. 1 Geo. I. c. 25. 9 Geo. I. c. 8. & 17 Geo. II. c. 40. with fine, corporal punishment, and imprisonment. And by statute 12 Geo. III. c. 24. to set on fire, burn, or destroy any of his majesty's ships of war, whether built, building, or repairing; or any of the king's arsenals, magazines, dock-yards, rope-yards, or victualling offices, or materials thereunto belonging; or military, naval, or victualling stores, or ammunition; or causing, aiding, procuring, abetting, or assisting in, such offence; shall be felony without benefit of clergy.

5. DESERTION from the king's armies in time of war, whether by land or sea, in England or in parts beyond the seas, is by the standing laws of the land (exclusive of the annual acts of parliament to punish mutiny and desertion) and particularly by statute 18 Hen. VI. c. 19. and 5 Eliz. c. 5. made felony, but not without benefit of clergy. But by the statute

ſtatute 2 & 3 Edw. VI. c. 2. clergy is taken away from ſuch deſerters, and the offence is made triable by the juſtices of every ſhire. The ſame ſtatutes puniſh other inferior military offences with fines, impriſonment, and other penalties (5).

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(5) To this claſs of felonies injurious to the king's prerogative may be added two felonies lately created by the legiſlature, who thought it expedient to repreſs the attempts of miſchievous and diſaffected perſons by tranſportation or capital puniſhment. The 37 Geo. III. c. 70. enacts, that if any perſon ſhall maliciouſly and adviſedly endeavour to ſeduce any perſon ſerving in his majeſty's ſervice by ſea or land from his duty and allegiance, or to incite any perſon to commit any act of mutiny or mutinous practice, he ſhall be guilty of felony, and ſhall ſuffer death without benefit of clergy.

The crime wherever committed may be tried in any county.

And by the 37 Geo. III. c. 123. it is enacted that whoever ſhall adminiſter, or cauſe to be adminiſtered, or ſhall be preſent at and conſenting to the adminiſtering of, or ſhall take any oath or engagement intended to bind any perſon in any mutinous or ſeditious purpoſe, or to belong to any ſeditious ſociety or confederacy, or to obey any committee, or any perſon, not having legal authority for that purpoſe, or not to give evidence againſt any confederate or other perſon, or not to diſcover any unlawful combination, or any illegal act, or any illegal oath or engagement, ſhall be guilty of felony, and may be tranſported for ſeven years. Compulſion ſhall be no excuſe, unleſs the party within four days after he has an opportunity diſcloſe the whole of the caſe to a juſtice of the peace, or if a ſeaman or ſoldier, to his commanding officer. An offence againſt this act committed anywhere may be tried in any county, unleſs it be committed in Scotland; it ſhall then be tried in the criminal courts of that country.

A perſon acquitted under either of theſe ſtatutes ſhall not be proſecuted again for the ſame fact for high treaſon; but theſe ſtatutes ſhall not prevent any perſon not already tried under theſe ſtatutes from being proſecuted for high treaſon, in the ſame manner as if they had not been paſſed.

CHAPTER THE EIGHTH.

OF PRAEMUNIRE.

A THIRD ſpecies of offence more immediately affecting the king and his government, though not ſubject to capital puniſhment, is that of *praemunire*: ſo called from the words of the writ preparatory to the proſecution thereof: "*praemunire*[a] *facias A. B.*" cauſe A. B. to be forewarned that he appear before us to anſwer the contempt wherewith he ſtands charged; which contempt is particularly recited in the preamble to the writ[b]. It took it's original from the exorbitant power claimed and exerciſed in England by the pope, which even in the days of blind zeal was too heavy for our anceſtors to bear.

IT may juſtly be obſerved, that religious principles, which (when genuine and pure) have an evident tendency to make their profeſſors better citizens as well as better men, have (when perverted and erroneous) been uſually ſubverſive of civil government, and been made both the cloak and the inſtrument of every pernicious deſign that can be harboured in the heart of man. The unbounded authority that was exerciſed by the druids in the weſt, under the influence of pagan ſuperſtition, and the terrible ravages committed by the Saracens in the eaſt, to propagate the religion of Mahomet, both witneſs to the truth of that antient univerſal obſervation, that in all ages and in all countries, civil and eccleſiaſtical tyranny

[a] A barbarous word for *praemoneri* (1). [b] Old *Nat. Brev.* 101. *edit.* 1534.

(1) *Praemunio*, in law-latin, is uſed in all its tenſes and participles, for *praemoneo* or *cito*. DUCANGE *Gloſſ.*

are

are mutually productive of each other. It is therefore the glory of the church of England, that she inculcates due obedience to lawful authority, and hath been (as her prelates on a trying occasion once expressed it[c]) in her principles and [104] practice ever most unquestionably loyal. The clergy of her persuasion, holy in their doctrines and unblemished in their lives and conversation, are also moderate in their ambition, and entertain just notions of the ties of society and the rights of civil government. As in matters of faith and morality they acknowlege no guide but the scriptures, so, in matters of external polity and of private right, they derive all their title from the civil magistrate; they look up to the king as their head, to the parliament as their law-giver, and pride themselves in nothing more justly, than in being true members of the church, emphatically *by law* established. Whereas the notions of ecclesiastical liberty, in those who differ from them, as well in one extreme as the other, (for I here only speak of extremes,) are equally and totally destructive of those ties and obligations by which all society is kept together; equally encroaching on those rights, which reason and the original contract of every free state in the universe have vested in the sovereign power; and equally aiming at a distinct independent supremacy of their own, where spiritual men and spiritual causes are concerned. The dreadful effects of such a religious bigotry, when actuated by erroneous principles, even of the protestant kind, are sufficiently evident from the history of the anabaptists in Germany, the covenanters in Scotland, and that deluge of sectaries in England, who murdered their sovereign, overturned the church and monarchy, shook every pillar of law, justice, and private property, and most devoutly established a kingdom of the saints in their stead. But these horrid devastations, the effects of mere madness, or of zeal that was nearly allied to it, though violent and tumultuous, were but of a short duration. Whereas the progress of the papal policy, long actuated by the steady counsels of successive pontiffs, took deeper root, and was at length in some places with difficulty, in others

[c] Address to James II. 1687.

never yet, extirpated. For this we might call to witneſs the black intrigues of the jeſuits, ſo lately triumphant over Chriſtendom, but now univerſally abandoned by even the Roman catholic powers: but the ſubject of our preſent
[105] chapter rather leads us to conſider the vaſt ſtrides, which were formerly made in this kingdom by the popiſh clergy; how nearly they arrived to effecting their grand deſign; ſome few of the means they made uſe of for eſtabliſhing their plan; and how almoſt all of them have been defeated or converted to better purpoſes, by the vigour of our free conſtitution, and the wiſdom of ſucceſſive parliaments.

THE antient Britiſh church, by whomſoever planted, was a ſtranger to the biſhop of Rome, and all his pretended authority. But the pagan Saxon invaders having driven the profeſſors of chriſtianity to the remoteſt corners of our iſland, their own converſion was afterwards effected by Auguſtin the monk, and other miſſionaries from the court of Rome. This naturally introduced ſome few of the papal corruptions in point of faith and doctrine; but we read of no civil authority claimed by the pope in theſe kingdoms, till the aera of the Norman conqueſt: when the then reigning pontiff having favoured duke William in his projected invaſion, by bleſſing his hoſt and conſecrating his banners, he took that opportunity alſo of eſtabliſhing his ſpiritual encroachments; and was even permitted ſo to do by the policy of the conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates; prelates, who, being bred abroad in the doctrine and practice of ſlavery, had contracted a reverence and regard for it, and took a pleaſure in rivetting the chains of a free-born people.

THE moſt ſtable foundation of legal and rational government is a due ſubordination of rank, and a gradual ſcale of authority; and tyranny alſo itſelf is moſt ſurely ſupported by a regular increaſe of deſpotiſm, riſing from the ſlave to the ſultan: with this difference however, that the meaſure of obedience in the one is grounded on the principles of ſociety,

and is extended no farther than reaſon and neceſſity will warrant: in the other it is limited only by abſolute will and pleaſure, without permitting the inferior to examine the title upon which it is founded. More effectually therefore to enſlave the conſciences and minds of the people, the Romiſh clergy themſelves paid the moſt implicit obedience to their [106] own ſuperiors or prelates; and they, in their turns, were as blindly devoted to the will of the ſovereign pontiff, whoſe deciſions they held to be infallible, and his authority co-extenſive with the chriſtian world. Hence his legates *a latere* were introduced into every kingdom of Europe, his bulles and decretal epiſtles became the rule both of faith and diſcipline, his judgment was the final reſort in all caſes of doubt or difficulty, his decrees were enforced by anathemas and ſpiritual cenſures, he dethroned even kings that were refractory, and denied to whole kingdoms (when undutiful) the exerciſe of chriſtian ordinances, and the benefits of the goſpel of God.

BUT, though the being ſpiritual head of the church was a thing of great ſound, and of greater authority, among men of conſcience and piety, yet the court of Rome was fully apprized that (among the bulk of mankind) power cannot be maintained without property; and therefore it's attention began very early to be rivetted upon every method that promiſed pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchaſe of maſſes to redeem the ſouls of the deceaſed. New-fangled offences were created, and indulgences were ſold to the wealthy, for liberty to ſin withour danger. The canon law took cognizance of crimes, injoined penance *pro ſalute animae*, and commuted that penance for money. Non-reſidence and pluralities among the clergy, and marriages among the laity related within the ſeventhdegree, were ſtrictly prohibited by canon; but diſpenſations were ſeldom denied to thoſe who could afford to buy them. In ſhort, all the wealth of chriſtendom was gradually drained by a thouſand channels, into the coffers of the holy ſee.

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THE eſtabliſhment alſo of the feodal ſyſtem in moſt of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for uſurping a ſimilar authority over all the preferments of the church; which began firſt in Italy, and gradually ſpread itſelf to England. The pope became a
[107] feodal lord; and all ordinary patrons were to hold their right of patronage, under this univerſal ſuperior. Eſtates held by feodal tenure, being originally gratuitous donations, were at that time denominated *beneficia*: their very name as well as conſtitution was borrowed, and the care of the ſouls of a pariſh thence came to be denominated a *benefice*. Lay fees were conferred by inveſtiture or delivery of corporal poſſeſſion; and ſpiritual benefices, which at firſt were univerſally donative, now received in like manner a ſpiritual inveſtiture, by inſtitution from the biſhop, and induction under his authority. As lands eſcheated to the lord, in defect of a legal tenant, ſo benefices lapſed to the biſhop upon non-preſentation by the patron, in the nature of a ſpiritual eſcheat. The annual tenths collected from the clergy were equivalent to the feodal render, or rent reſerved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vaſal by his ſuperior; and the *primer ſeiſins* of our military tenures, whereby the firſt profits of an heir's eſtate were cruelly extorted by his lord, gave birth to as cruel an exaction of firſt-fruits from the beneficed clergy. And the occaſional aids and talliages, levied by the prince on his vaſals, gave a handle to the pope to levy, by the means of his legates *a latere*, peter-pence and other taxations.

AT length the holy father went a ſtep beyond any example of either emperor or feodal lord. He reſerved to himſelf, by his own apoſtolical authority [d], the preſentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occaſion, or on his journey thither, or back again; and moreover ſuch alſo as became vacant by his promotion to a biſhoprick or abbey: "*etiamſi*

[d] *Extrav. l. 3. t. 2, c. 13.*

"*ad*

"*ad illa perſonae conſueverint et debuerint per electionem aut* "*quemvis alium modum aſſumi.*" And this laſt, the canoniſts declared, was no detriment at all to the patron, being only like the change of a life in a feodal eſtate by the lord. Diſpenſations to avoid theſe vacancies begat the doctrine of *commendams:* and papal *proviſions* were the previous nomination to ſuch benefices, by a kind of anticipation, before they became actually void: though afterwards indiſcriminately ap- [108] plied to any right of patronage exerted or uſurped by the pope. In conſequence of which the beſt livings were filled by Italian and other foreign clergy, equally unſkilled in and adverſe to the laws and conſtitution of England. The very nomination to biſhopricks, that antient prerogative of the crown, was wreſted from king Henry the firſt, and afterwards from his ſucceſſor king John; and ſeemingly indeed conferred on the chapters belonging to each ſee: but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually veſted in the pope. And, to ſum up this head with a tranſaction moſt unparalleled and aſtoniſhing in it's kind, pope Innocent III. had at length the effrontery to demand, and king John had the meanneſs to conſent to, a reſignation of his crown to the pope, whereby England was to become for ever St. Peter's patrimony; and the daſtardly monarch re-accepted his ſceptre from the hands of the papal legate, to hold as the vaſal of the holy ſee, at the annual rent of a thouſand marks.

ANOTHER engine ſet on foot, or at leaſt greatly improved, by the court of Rome, was a maſter-piece of papal policy. Not content with the ample proviſion of tithes, which the law of the land had given to the parochial clergy, they endeavoured to graſp at the lands and inheritances of the kingdom, and (had not the legiſlature withſtood them) would by this time have probably been maſters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of four and auſtere religion, ſeparated from the world and it's concerns by a vow of perpetual celibacy, yet faſcinating the minds of the people by

by pretences to extraordinay ſanctity, while all their aim was to aggrandize the power and extend the influence of their grand ſuperior the pope. And as, in thoſe times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe, that founding a monaſtery a little before their deaths would atone for a life of incontinence, diſorder, and bloodſhed. Hence innumerable abbeys and religious houſes were built within a
[109] century after the conqueſt, and endowed, not only with the tithes of pariſhes which were raviſhed from the ſecular clergy, but alſo with lands, manors, lordſhips, and extenſive baronies. And the doctrine inculcated was, that whatever was ſo given to, or purchaſed by, the monks and friars, was conſecrated to God himſelf; and that to alienate or take it away was no leſs than the ſin of ſacrilege.

I MIGHT here have enlarged upon other contrivances, which will occur to the recollection of the reader, ſet on foot by the court of Rome, for effecting an entire exemption of it's clergy from any intercourſe with the civil magiſtrate: ſuch as the ſeparation of the eccleſiaſtical court from the temporal; the appointment of it's judges by merely ſpiritual authority, without any interpoſition from the crown; the excluſive juriſdiction it claimed over all eccleſiaſtical perſons and cauſes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or puniſhment except before their own tribunal. But the hiſtory and progreſs of eccleſiaſtical courts [e], as well as of purchaſes in mortmain [f], have already been fully diſcuſſed in the preceding volumes: and we ſhall have an opportunity of examining at large the nature of the *privilegium clericale* in the progreſs of the preſent book. And therefore I ſhall only obſerve at preſent, that notwithſtanding this plan of pontifical power was ſo deeply laid, and ſo indefatigably purſued by the unwearied politics of the court of Rome through a long ſucceſſion of ages; notwithſtanding it was poliſhed and improved by the united endeavours of a body of men, who engroſſed all the learning of

[e] See Vol. III. pag. 61. [f] See Vol. II. pag. 268.

Europe

Europe for centuries together; notwithſtanding it was firmly and reſolutely executed by perſons the beſt calculated for eſtabliſhing tyranny and deſpotiſm, being fired with a bigoted enthuſiaſm, (which prevailed not only among the weak and ſimple, but even among thoſe of the beſt natural and acquired endowments,) unconnected with their fellow-ſubjects, and totally indifferent what might befal that poſterity to which they bore no endearing relation:—yet it vaniſhed into nothing, when the eyes of the people were a little enlightened, [110] and they ſet themſelves with vigour to oppoſe it. So vain and ridiculous is the attempt to live in ſociety, without acknowleging the obligations which it lays us under; and to affect an entire independence of that civil ſtate, which protects us in all our rights, and gives us every other liberty, that only excepted of deſpiſing the laws of the community.

HAVING thus in ſome degree endeavoured to trace out the original and ſubſequent progreſs of the papal uſurpations in England, let us now return to the ſtatutes of *praemunire*, which were framed to encounter this overgrown yet increaſing evil. King Edward I. a wiſe and magnanimous prince, ſet himſelf in earneſt to ſhake off this ſervile yoke [g]. He would not ſuffer his biſhops to attend a general council, till they had ſworn not to receive the papal benediction. He made light of all papal bulles and proceſſes: attacking Scotland in defiance of one; and ſeiſing the temporalties of his clergy, who under pretence of another refuſed to pay a tax impoſed by parliament. He ſtrengthened the ſtatutes of mortmain; thereby cloſing the great gulph, in which all the lands of the kingdom were in danger of being ſwallowed. And, one of his ſubjects having obtained a bulle of excommunication againſt another, he ordered him to be executed as a traitor, according to the antient law [h]. And in the thirty-fifth year of his reign was made the firſt ſtatute againſt papal proviſions, being, according to ſir Edward Coke [i], the foundation of all the ſubſequent ſtatutes of *praemunire*, which we rank as an offence

[g] Dav. 83, &c.
[h] Bro. *Abr. tit. Coron.* 115. *Treaſon*, 14. 5 Rep. part 1. fol. 12. 3 Aſſ. 19.
[i] 2 Inſt. 583.

immediately againſt the king, becauſe every encouragement of the papal power is a diminution of the authority of the crown.

IN the weak reign of Edward the ſecond the pope again endeavoured to encroach, but the parliament manfully withſtood him; and it was one of the principal articles charged againſt that unhappy prince, that he had given allowance to the bulles of the ſee of Rome. But Edward the third was of a temper extremely different: and to remedy theſe incon-
[111] veniences firſt by gentle means, he and his nobility wrote an expoſtulation to the pope: but receiving a menacing and contemptuous anſwer, withal acquainting him, that the Emperor, (who a few years before at the diet of Nuremberg, *A. D.* 1323, had eſtabliſhed a law againſt proviſions [k],) and alſo the king of France, had lately ſubmitted to the holy ſee; the king replied, that if both the Emperor and the French king ſhould take the pope's part, he was ready to give battle to them both, in defence of the liberties of the crown. Hereupon more ſharp and penal laws were deviſed againſt proviſors [l], which enact ſeverally, that the court of Rome ſhall not preſent or collate to any biſhoprick or living in England; and that whoever diſturbs any patron in the preſentation to a living by virtue of a papal proviſion, ſuch proviſor ſhall pay fine and ranſom to the king at his will, and be impriſoned till he renounces ſuch proviſion: and the ſame puniſhment is inflicted on ſuch as cite the king, or any of his ſubjects, to anſwer in the court of Rome. And when the holy ſee reſented theſe proceedings, and pope Urban V. attempted to revive the vaſalage and annual rent to which king John had ſubjected his kingdom, it was unanimouſly agreed by all the eſtates of the realm in parliament aſſembled, 40 Edw. III. that king John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation oath: and all the temporal nobility and commons engaged, that if the pope ſhould endeavour by proceſs or otherwiſe to

[k] Mod. Un. Hiſt. xxix. 293.
[l] Stat. 25 Edw. III. ſt. 6. 27 Edw. III. ſt. 1. c. 1. 38 Edw. III. ſt. 1. c. 4. & ſt. 2. c. 1, 2, 3, 4.

maintain

maintain these usurpations, they would resist and withstand him with all their power [m].

In the reign of Richard the second, it was found necessary to sharpen and strengthen these laws, and therefore it was enacted by statutes 3 Ric. II. c. 3. and 7 Ric. II. c. 12. first, that no alien should be capable of letting his benefice to farm: in order to compel such, as had crept in, at least to reside on their preferments: and, afterwards, that no alien should be capable to be presented to any ecclesiastical preferment, under the penalty of the statutes of provisors. By the statute 12 Ric. II. c. 15. all liegemen of the king, accepting of a living by any foreign provision, are put out of the king's protection, and the benefice made void. To which the statute 13 Ric. II. st. 2. c. 2. adds banishment and forfeiture of lands and goods: and by c. 3. of the same statute, any person bringing over any citation or excommunication from beyond sea, on account of the execution of the foregoing statutes of provisors, shall be imprisoned, forfeit his goods and lands, and moreover suffer pain of life and member. [112]

In the writ for the execution of all these statutes the words *praemunire facias*, being (as we said) used to command a citation of the party, have denominated in common speech not only the writ, but the offence itself of maintaining the papal power, by the name of *praemunire*. And accordingly the next statute I shall mention, which is generally referred to by all subsequent statutes, is usually called the statute of *praemunire*. It is the statute 16 Ric. II. c. 5. which enacts, that whoever procures at Rome, or elsewhere, any translations, processes, excommunications, bulles, instruments, or other things which touch the king, against him, his crown, and realm, and all persons aiding and assisting therein, shall be put out of the king's protection, their lands and goods forfeited to the king's use, and they shall be attached by their bodies to answer to the king and his council: or process of

[m] Seld. *in Flet.* 10. 4.

praemunire facias ſhall be made out againſt them, as in other caſes of proviſors.

By the ſtatute 2 Hen. IV. c. 3. all perſons who accept any proviſion from the pope, to be exempt from canonical obedience to their proper ordinary, are alſo ſubjected to the penalties of *praemunire*. And this is the laſt of our antient ſtatutes touching this offence; the uſurped civil power of the biſhop of Rome being pretty well broken down by theſe ſtatutes, as his uſurped religious power was in about a century afterwards; the ſpirit of the nation being ſo much raiſed
[113] againſt foreigners, that about this time, in the reign of Henry the fifth, the alien priories, or abbeys for foreign monks, were ſuppreſſed, and their lands given to the crown. And no farther attempts were afterwards made in ſupport of theſe foreign juriſdictions.

A LEARNED writer, before referred to, is therefore greatly miſtaken, when he ſays [n], that in Henry the ſixth's time the archbiſhop of Canterbury and other biſhops offered to the king a large ſupply, if he would conſent that all laws againſt proviſors, and eſpecially the ſtatute 16 Ric. II. might be repealed; but that this motion was rejected. This account is incorrect in all it's branches. For, firſt, the application, which he probably means, was made not by the biſhops only, but by the unanimous conſent of a provincial ſynod, aſſembled in 1439, 18 Hen. VI. that very ſynod which at the ſame time refuſed to confirm and allow a papal bulle, which then was laid before them. Next, the purport of it was not to procure a repeal of the ſtatutes againſt proviſors, or that of Richard II. in particular; but to requeſt that the penalties thereof, which by forced conſtruction were applied to all that ſued in the ſpiritual, and even in many temporal, courts of this realm, might be turned againſt the proper objects only; thoſe who appealed to Rome, or to any foreign juriſdictions: the tenor of the petition being, "that thoſe penal-
"ties ſhould be taken to extend only to thoſe that com-

[n] Dav. 96.

"menced

"menced any ſuits or procured any writs or public inſtruments "at Rome or elſewhere out of England; and that no one "ſhould be proſecuted upon that ſtatute for any ſuit in the "ſpiritual courts or lay juriſdictions of this kingdom." Laſtly, the motion was ſo far from being rejected, that the king promiſed to recommend it to the next parliament, and in the mean time that no one ſhould be moleſted upon this account. And the clergy were ſo ſatisfied with their ſucceſs, that they granted to the king a whole tenth upon this occaſion [o].

AND indeed ſo far was the archbiſhop, who preſided in [114] this ſynod, from countenancing the uſurped power of the pope in this realm, that he was ever a firm oppoſer of it. And, particularly in the reign of Henry the fifth, he prevented the king's uncle from being then made a cardinal, and legate *a latere* from the pope; upon the mere principle of it's being within the miſchief of papal proviſions, and derogatory from the liberties of the Engliſh church and nation. For, as he expreſſed himſelf to the king in his letter upon that ſubject, "he was bound to oppoſe it by his ligeance, "and alſo to quit himſelf to God, and the church of this "land, of which God and the king had made him governor." This was not the language of a prelate addicted to the ſlavery of the ſee of Rome; but of one who was indeed of principles ſo very oppoſite to the papal uſurpations, that in the year preceding this ſynod, 17 Hen. VI. he refuſed to conſecrate a biſhop of Ely, that was nominated by pope Eugenius IV. A conduct quite conſonant to his former behaviour, in 6 Hen. VI. when he refuſed to obey the commands of pope Martin V. who had required him to exert his endeavours to repeal the ſtatute of *praemunire* ("*execrabile illud ſtatutum*," as the holy father phraſes it); which refuſal ſo far exaſperated the court of Rome againſt him, that at length the pope iſſued a bulle to ſuſpend him from his office and authority, which the archbiſhop diſregarded, and appealed to a general council. And ſo ſenſible were the nation of their primate's merit, that

[o] Wilk. *Concil. Mag. Brit. III.* 533.

the lords ſpiritual and temporal, and alſo the univerſity of Oxford, wrote letters to the pope in his defence; and the houſe of commons addreſſed the king, to ſend an embaſſador forthwith to his holineſs, on behalf of the archbiſhop, who had incurred the diſpleaſure of the pope for oppoſing the exceſſive power of the court of Rome [p].

[115] THIS then is the original meaning of the offence, which we call *praemunire*; viz. introducing a foreign power into this land, and creating *imperium in imperio*, by paying that obedience to papal proceſs, which conſtitutionally belonged to the king alone, long before the reformation in the reign of Henry the eighth: at which time the penalties of *praemunire* were indeed extended to more papal abuſes than before; as the kingdom then entirely renounced the authority of the ſee of Rome, though not all the corrupted doctrines of the Roman church. And therefore by the ſeveral ſtatutes of 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 19 & 21. to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at; to ſue to Rome for any licence of diſpenſation; or to obey any proceſs from thence; are made liable to the pains of *praemunire*. And, in order to reſtore to the king in effect the nomination of vacant biſhopricks, and yet keep up the eſtabliſhed forms, it is enacted by ſtatute 25 Hen. VIII. c. 20. that if the dean and chapter refuſe to elect the perſon named by the king, or any archbiſhop or biſhop to confirm or conſecrate him, they ſhall fall within the penalties of the ſtatutes of *praemunire*. Alſo by ſtatute 5 Eliz. c. 1. to refuſe the oath of ſupremacy will incur the pains of *praemunire*; and to defend the pope's juriſdiction in this realm, is a *praemunire* for the firſt offence, and high treaſon for the ſecond. So too, by ſtatute 13 Eliz.

[p] See Wilk. *Concil. Mag. Br.* Vol. III. *paſſim*. and Dr. Duck's life of archbiſhop Chichele, who was the prelate here ſpoken of, and the munificent founder of All Soul's college in Oxford: in vindication of whoſe memory the author hopes to be excuſed this digreſſion; if indeed it be a digreſſion, to ſhew how contrary to the ſentiments of ſo learned and pious a prelate, even in the days of popery, thoſe uſurpations were, which the ſtatutes of *praemunire* and proviſors were made to reſtrain.

c. 2. to import any *agnus Dei*, croſſes, beads, or other ſuperſtitious things pretended to be hallowed by the biſhop of Rome, and tender the ſame to be uſed; or to receive the ſame with ſuch intent, and not diſcover the offender; or if a juſtice of the peace, knowing thereof, ſhall not within fourteen days declare it to a privy counſellor; they all incur a *praemunire*. But importing or ſelling maſs-books, or other popiſh books, is by ſtatute 3 Jac. I. c. 5. § 25. only liable to a penalty of forty ſhillings. Laſtly, to contribute to the maintenance of a jeſuit's college, or any popiſh ſeminary whatever, beyond ſea; or any perſon in the ſame; or to contribute to the maintenance of any jeſuit or popiſh prieſt in England, is by ſtatute 27 Eliz. c. 2. made liable to the penalties of *praemunire*.

THUS far the penalties of *praemunire* ſeem to have kept within the proper bounds of their original inſtitution, the depreſſing the power of the pope: but, they being pains of no inconſiderable conſeqnence, it has been thought fit to apply the ſame to other heinous offences; ſome of which bear more, and ſome leſs relation to this original offence, and ſome no relation at all. [116]

THUS, 1. By the ſtatute 1 & 2 Ph. & Mar. c. 8. to moleſt the poſſeſſors of abbey lands granted by parliament to Henry the eighth, and Edward the ſixth, is a *praemunire*. 2. So likewiſe is the offence of acting as a broker or agent in any uſurious contract, when above ten *per cent.* intereſt is taken, by ſtatute 13 Eliz. c. 10. 3. To obtain any ſtay of proceedings, other than by arreſt of judgment or writ of error, in any ſuit for a monopoly, is likewiſe a *praemunire*, by ſtatute 21 Jac. I. c. 3. 4. To obtain an excluſive patent for the ſole making or importation of gunpowder or arms, or to hinder others from importing them, is alſo a *praemunire* by two ſtatutes: the one 16 Car. I. c. 21. the other 1 Jac. II. c. 8. 5. On the abolition, by ſtatute 12 Car. II. c. 24. of purveyance [q], and the prerogative of pre-emption, or taking any victual, beaſts, or goods for the king's uſe, at a ſtated price,

[q] See vol. I. pag. 287.

without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *praemunire*. 6. To assert, maliciously and advisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *praemunire* by statute 13 Car. II. c. 1. 7. By the *habeas corpus* act also, 31 Car. II. c. 2. it is a *praemunire*, and incapable of the king's pardon, besides other heavy penalties[r], to send any subject of this realm a prisoner into parts beyond the seas. 8. By the statute 1 W. & M. st. 1. c. 8. persons of eighteen years of age, refusing to take the new oaths of allegiance, as well as supremacy, upon tender by the proper magistrate, are subject to the penalties of a *praemunire* (5); and by statute
[117] 7 & 8 W. III. c. 24. serjeants, counsellors, proctors, attorneys, and all officers of courts, practising without having taken the oaths of allegiance and supremacy, and subscribed the declaration against popery, are guilty of a *praemunire*, whether the oaths be tendered or no. 9. By the statute 6 Ann. c. 7. to assert maliciously and directly, by preaching, teaching, or advised speaking, that the then pretended prince of Wales, or any person other than according to the acts of settlement and union, hath any right to the throne of these kingdoms; or that the king and parliament cannot make laws to limit the descent of the crown; such preaching, teaching, or advised speaking is a *praemunire:* as writing, printing, or publishing the same doctrines amounted, we may remember, to high treason. 10. By statute 6 Ann. c. 23. if the assembly of peers of Scotland, convened to elect their sixteen representatives in the British parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *praemunire*. 11. The statute 6 Geo. I. c. 18. (enacted in the year after the infamous south sea project had

[r] See vol. I. pag. 138. vol. III. pag. 137.

(5) By the 31 Geo. III. c. 32. s. 18. it is enacted, that no person shall be summoned to take the oath of supremacy, or make the declaration against transubstantiation, or be prosecuted for not obeying a summons for that purpose.

beggared

beggared half the nation) makes all unwarrantable undertakings by unlawful subscriptions, then commonly known by the names of bubbles, subject to the penalties of a *praemunire*. 12. The statute 12 Geo. III. c. 11. subjects to the penalties of the statute of *praemunire* all such as knowingly and wilfully solemnize, assist, or are present at, any forbidden marriage of such of the descendants of the body of king George II. as are by that act prohibited to contract matrimony without the consent of the crown [s].

HAVING thus inquired into the nature and several species of *praemunire*, it's punishment may be gathered from the foregoing statutes, which are thus shortly summed up by sir Edward Coke [t]: "that, from the conviction, the defendant "shall be out of the king's protection, and his lands and "tenements, goods and chattels, forfeited to the king: and "that his body shall remain in prison *at the king's pleasure*; "or (as other authorities have it) *during life* [u]:" both which [118] amount to the same thing; as the king by his prerogative may any time remit the whole, or any part, of the punishment, except in the case of transgressing the statute of *habeas corpus*. These forfeitures here inflicted, do not (by the way) bring this offence within our former definition of felony; being inflicted by particular statutes, and not by the common law. But so odious, sir Edward Coke adds, was this offence of *praemunire*, that a man that was attainted of the same might have been slain by any other man without danger of law: because it was provided by law [w], that any man might do to him as to the king's enemy; and any man may lawfully kill an enemy. However, the position itself, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle, or for necessary self-defence. And to obviate such savage and mistaken notions [x], the statute 5 Eliz. c. 1. provides, that it shall not be lawful to kill any person

[s] See book I. ch. 4.
[t] 1 Inst. 129.
[u] 1 Bulst. 199.
[w] Stat. 25 Edw. III. st. 5. c. 22.
[x] Bro. *Abr. t. corone*, 196.

attainted in a *praemunire*, any law, ſtatute, opinion, or expoſition of law to the contrary notwithſtanding. But ſtill ſuch delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious ſoever, being ſo far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may ſuffer. And no man, knowing him to be guilty, can with ſafety give him comfort, aid, or relief [v] (6).

[v] 1 Hawk. P.C. 55.

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(6) The terrible penalties of a *praemunire* are denounced by a great variety of ſtatutes, yet proſecutions upon a *praemunire* are unheard of in our courts.

There is only one inſtance of ſuch a proſecution in the State Trials, in which caſe the penalties of a *praemunire* were inflicted upon ſome perſons, for refuſing to take the oath of allegiance in the reign of Charles the ſecond. *Harg. St. Tr.* 2 vol. 463.

CHAPTER THE NINTH.

OF MISPRISIONS AND CONTEMPTS, AFFECTING THE KING AND GOVERNMENT.

THE fourth ſpecies of offences more immediately againſt the king and government, are intitled miſpriſions and contempts.

MISPRISIONS (a term derived from the old French, *meſpris*, a neglect or contempt) are, in the acceptation of our law, generally underſtood to be all ſuch high offences as are under the degree of capital, but nearly bordering thereon: and it is ſaid, that a miſpriſion is contained in every treaſon and felony whatſoever; and that, if the king ſo pleaſe, the offender may be proceeded againſt for the miſpriſion only [a]. And upon the ſame principle, while the juriſdiction of the ſtar-chamber ſubſiſted, it was held that the king might remit a proſecution for treaſon, and cauſe the delinquent to be cenſured in that court, merely for a high miſdemeſnor: as happened in the caſe of Roger earl of Rutland, in 43 Eliz. who was concerned in the earl of Eſſex's rebellion [b]. Miſpriſions are generally divided into two ſorts: negative, which conſiſt in the concealment of ſomething which ought to be revealed; and poſitive, which conſiſt in the commiſſion of ſomething which ought not to be done.

[a] Yearb. 2 *Ric. III.* 10. Staundf. P. C. 37. Kel. 71. 1 Hal. P. C. 374. 1 Hawk. P. C. 55, 56.

[b] Hudſon of the court of ſtar-chamber. *MS. in Muſ. Brit.*

I. OF

I. Of the firſt, or negative kind, is what is called *miſpriſion of treaſon*; conſiſting in the bare knowlege and concealment of treaſon, without any degree of aſſent thereto: for any aſſent makes the party a principal traitor; as indeed the concealment, which was conſtrued aiding and abetting, did at the common law: in like manner as the knowlege of a plot againſt the ſtate, and not revealing it, was a capital crime at Florence and other ſtates of Italy [c]. But it is now enacted by the ſtatute 1 & 2 Ph. & Mar. c. 10. that a bare concealment of treaſon ſhall be only held a miſpriſion. This concealment becomes criminal, if the party apprized of the treaſon does not, as ſoon as conveniently may be, reveal it to ſome judge of aſſiſe or juſtice of the peace [d]. But if there be any probable circumſtances of aſſent, as if one goes to a treaſonable meeting, knowing before-hand that a conſpiracy is intended againſt the king; or, being in ſuch company once by accident, and having heard ſuch treaſonable conſpiracy, meets the ſame company again, and hears more of it, but conceals it; this is an implied aſſent in law, and makes the concealer guilty of actual high treaſon [e].

THERE is alſo one poſitive miſpriſion of treaſon, created ſo by act of parliament. The ſtatute 13 Eliz. c. 2. enacts, that thoſe who forge foreign coin, not current in this kingdom, their aiders, abettors, and procurers, ſhall all be guilty of miſpriſion of treaſon. For, though the law would not put foreign coin upon quite the ſame footing as our own; yet, if the circumſtances of trade concur, the falſifying it may be attended with conſequences almoſt equally pernicious to the public; as the counterfeiting of Portugal money would be at preſent: and therefore the law has made it an offence juſt below capital, and that is all. For the puniſhment of miſpriſion of treaſon is loſs of the profits of lands during life, forfeiture of goods and impriſonment during life [f]. Which total forfeiture of the goods was originally inflicted while

[c] Guicciard. Hiſt. b. 3 & 13.
[d] 1 Hal. P. C. 372.
[e] 1 Hawk. P. C. 56.
[f] 1 Hal. P. C. 374.

the

the offence amounted to principal treaſon, and of courſe included in it a felony, by the common law; and therefore is no exception to the general rule laid down in a former chapter[g], that wherever an offence is puniſhed by ſuch total forfeiture it is felony at the common law.

MISPRISION *of felony* is alſo the concealment of a felony which a man knows, but never aſſented to; for if he aſſented, this makes him either principal or acceſſory. And the puniſhment of this, in a public officer, by the ſtatute Weſtm. 1. 3 Edw. I. c. 9. is impriſonment for a year and a day; in a common perſon, impriſonment for a leſs diſcretionary time; and, in both, fine and ranſom at the king's pleaſure: which pleaſure of the king muſt be obſerved, once for all, not to ſignify any extrajudicial will of the ſovereign, but ſuch as is declared by his repreſentatives, the judges in his courts of juſtice; "*voluntas regis in curia, non in camera*[h]."

THERE is alſo another ſpecies of negative miſpriſions: namely, the *concealing of treaſure-trove*, which belongs to the king or his grantees by prerogative royal: the concealment of which was formerly puniſhable by death[i]; but now only by fine and impriſonment[j].

II. MISPRISIONS, which are merely poſitive, are generally denominated *contempts* or *high miſdemeſnors*; of which

1. THE firſt and principal is the *mal-adminiſtration* of ſuch high officers, as are in public truſt and employment. This is uſually puniſhed by the method of parliamentary impeachment: wherein ſuch penalties, ſhort of death, are inflicted, as to the wiſdom of the houſe of peers ſhall ſeem proper; conſiſting uſually of baniſhment, impriſonment, fines, or perpetual diſability. Hitherto alſo may be referred the

[g] See pag. 94.
[h] 1 Hal. P. C. 375.
[i] Glanv. *l.* 1. *c.* 2.
[j] 3 Inſt. 133.

offence

offence of *imbezzling the public money*, called among the Romans *peculatus*, which the Julian law puniſhed with death in a magiſtrate, and with deportation, or baniſhment, in a private perſon [k]. With us it is not a capital crime, but ſubjects the committer of it to a diſcretionary fine and impriſonment. Other miſpriſions are, in general, ſuch contempts of the executive magiſtrate, as demonſtrate themſelves by ſome arrogant and undutiful behaviour towards the king and government. Theſe are

2. CONTEMPTS againſt the king's *prerogative*. As, by refuſing to aſſiſt him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by perſonal ſervice for defence of the realm, againſt a rebellion or invaſion [l]. Under which claſs may be ranked the neglecting to join the *poſſe comitatus*, or power of the county, being thereunto required by the ſheriff or juſtices, according to the ſtatute 2 Hen. V. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel [m]. Contempts againſt the prerogative may alſo be, by preferring the intereſts of a foreign potentate to thoſe of our own, or doing or receiving any thing that may create an undue influence in favour of ſuch extrinſic power; as, by taking a penſion from any foreign prince without the conſent of the king [n]. Or, by diſobeying the king's lawful commands; whether by writs iſſuing out of his courts of juſtice, or by a ſummons to attend his privy council, or by letters from the king to a ſubject commanding him to return from beyond the ſeas, (for diſobedience to which his lands ſhall be ſeiſed till he does return, and himſelf afterwards puniſhed,) or by his writ of *ne exeat regnum*, or proclamation, commanding the ſubject to ſtay at home [o]. Diſobedience to any of theſe commands is a high miſpriſion and contempt; and ſo, laſtly, is diſobedience to any act of parliament, where no particular penalty is aſſigned; for then it is puniſhable, like the reſt of

[k] *Inſt.* 4. 18. 9.
[l] 1 Hawk. P. C. 59.
[m] Lamb. Fir. 315.
[n] 3 Inſt. 144.
[o] See Vol. I. pag. 266.

these contempts, by fine and imprisonment, at the discretion of the king's courts of justice [p].

3. CONTEMPTS and misprisions against the king's *person* and *government*, may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing any thing that may tend to lessen him in the esteem of his subjects, may weaken his government, or, may raise jealousies between him and his people. It has been also held an offence of this species to drink to the pious memory of a traitor; or for a clergyman to absolve persons at the gallows, who there persist in the treasons for which they die: these being acts which impliedly encourage rebellion. And for this species of contempt a man may not only be fined and imprisoned, but suffer the pillory or other infamous corporal punishment [q]: in like manner as, in the antient German empire, such persons as endeavoured to sow sedition, and disturb the public tranquillity, were condemned to become the objects of public notoriety and derision, by carrying a dog upon their shoulders from one great town to another. The emperors Otho I. and Frederic Barbarossa inflicted this punishment on noblemen of the highest rank [r].

4. CONTEMPTS against the king's *title*, not amounting to treason or *praemunire*, are the denial of his right to the crown in common and unadvised discourse; for, if it be by advisedly speaking, we have seen [s] that it amounts to a *praemunire*. This heedless species of contempt is however punished by our law with fine and imprisonment. Likewise if any person shall in any wise hold, affirm, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a misdemesnor, by statute 13 Eliz. c. 1. and punishable with forfeiture of goods and chattels. A contempt may also arise from refusing or neglecting to take the oaths, appointed by statute for the better securing the government; and yet

[p] 1 Hawk. P. C. 60.
[q] *Ibid.*
[r] Mod. Un. Hist. xxix. 28. 119.
[s] See pag. 91.

acting

acting in a public office, place of truſt, or other capacity, for which the ſaid oaths are required to be taken; *viz.* thoſe of allegiance, ſupremacy, and abjuration; which muſt be taken within ſix calendar months after admiſſion. The penalties for this contempt, inflicted by ſtatute 1 Geo. I. ſt. 2. c. 13. are very little, if any thing, ſhort of thoſe of a *praemunire*: being an incapacity to hold the ſaid offices, or any other; to proſecute any ſuit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction the offender ſhall alſo forfeit 500*l.* to him or them that will ſue for the ſame (1). Members on the foundation of any college in the two univerſities, who by this ſtatute are bound to take the oaths, muſt alſo regiſter a certificate thereof in the college regiſter, within one month after; otherwiſe, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a perſon to ſucceed him by his great ſeal or ſign manual. Beſides thus taking the oaths for offices, any two juſtices of the peace may by the ſame ſtatute ſummon, and tender the oaths to, any perſon whom they ſhall ſuſpect to be diſaffected; and every perſon refuſing the ſame, who is properly called a non-juror, ſhall be adjudged a popiſh recuſant convict, and ſubject to the ſame penalties that were mentioned in a former chapter[t]; which in the end may amount to the alternative of abjuring the realm, or ſuffering death as a felon (2).

5. CONTEMPTS againſt the king's *palaces* or *courts of juſtice* have been always looked upon as high miſpriſions: and by the antient law, before the conqueſt, fighting in the king's palace, or before the king's judges, was puniſhed with death[v]. So too, in the old Gothic conſtitution, there were many places privileged by law, *quibus major reverentia et ſe-*

[t] See pag. 55.

[v] 3 Inſt. 140. *LL. Alured. cap.* 7, & 34.

(1) See page 59. note 3.

(2) See page 116. note 1.

curitas

curitas debetur, ut templa et judicia, quae ſancta habebantur, —arces et aula regis,—denique locus quilibet praeſente aut adventante rege [u]. And at preſent, with us, by the ſtatute 33 Hen. VIII. c. 12. malicious ſtriking in the king's palace, [125] wherein his royal perſon reſides, whereby blood is drawn, is puniſhable by perpetual impriſonment, and fine at the king's pleaſure; and alſo with loſs of the offender's right hand, the ſolemn execution of which ſentence is preſcribed in the ſtatute at length (3).

BUT *ſtriking* in the king's ſuperior courts of juſtice, in Weſtminſter-hall, or at the aſſiſes, is made ſtill more penal than even in the king's palace. The reaſon ſeems to be, that thoſe courts being antiently held in the king's palace, and before the king himſelf, ſtriking there included the former contempt againſt the king's palace, and ſomething more; *viz.* the diſturbance of public juſtice. For this reaſon, by the antient common law before the conqueſt [w], ſtriking in the king's courts of juſtice, or drawing a ſword therein, was a capital felony: and our modern law retains ſo much of the antient ſeverity as only to exchange the loſs

[u] Stiernh. *de jure Goth. l.* 3. *c.* 3.
[w] *LL. Inae. c.* 6. *LL. Canut. c.* 56. *LL. Alured. c.* 7.

(3) Mr. Hargrave has given in the 11th vol. of the State Trials, p. 16. an extract from Stowe's Annals, containing a very curious account of the circumſtances of the trial of ſir Edmund Knevet, who was proſecuted upon this ſtatute, ſoon after it was enacted: "for which offence he was not onely judged to looſe his hand, but "alſo his body to remaine in priſon, and his lands and goods at "the king's pleaſure. Then the ſaid ſir Edmund Knevet deſired "that the king, of his benigne grace, would pardon him of his "right hand, and take the left: for (quoth he) if my right be "ſpared, I may hereafter doe ſuch good ſervice to his grace, as "ſhall pleaſe him to appoint. Of this ſubmiſſion and requeſt the "juſtices forthwith informed the king, who of his goodneſs, con-"ſidering the gentle heart of the ſaid Edmund, and the good re-"port of lords and ladies, granted him pardon, that he ſhould looſe "neither hand, land, nor goods, but ſhould go free at liberty."

of life for the loſs of the offending limb. Therefore a ſtroke or blow in ſuch a court of juſtice, whether blood be drawn or not, or even aſſaulting a judge ſitting in the court, by drawing a weapon, without any blow ſtruck, is puniſhable with the loſs of the right hand, impriſonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life [x]. A *reſcue* alſo of a priſoner from any of the ſaid courts, without ſtriking a blow, is puniſhed with perpetual impriſonment, and forfeiture of goods, and of the profits of lands during life [y]: being looked upon as an offence of the ſame nature with the laſt; but only, as no blow is actually given, the amputation of the hand is excuſed. For the like reaſon an affray, or riot, near the ſaid courts, but out of their actual view, is puniſhed only with fine and impriſonment [z].

[126] NOT only ſuch as are guilty of an actual violence, but of threatening or reproachful words to any judge ſitting in the courts, are guilty of a high miſpriſion, and have been puniſhed with large fines, impriſonment, and corporal puniſhment [a]. And, even in the inferior courts of the king, an affray, or contemptuous behaviour, is puniſhable with a fine by the judges there ſitting; as by the ſteward in a court-leet, or the like [b].

LIKEWISE all ſuch, as are guilty of any injurious treatment to thoſe who are immediately under the protection of a court of juſtice, are puniſhable by fine and impriſonment: as if a man aſſaults or threatens his adverſary for ſuing him, a counſellor or attorney for being employed againſt him, a juror for his verdict, or a gaoler or other miniſterial officer for keeping him in cuſtody, and properly executing his duty [c]: which offences, when they proceeded farther than bare threats, were puniſhed in the Gothic conſtitutions with exile and forfeiture of goods [d].

x Staund. P. C. 38. 3 Inſt. 140, 141.
y 1 Hawk. P. C. 57.
z Cro. Car. 373.
a *Ibid.* 503.
b 1 Hawk. P. C. 78.
c 3 Inſt. 141, 142.
d Stiernh. *de jure Goth. l.* 3. *c.* 3.

LASTLY,

LASTLY, to endeavour to diſſuade a witneſs from giving evidence; to diſcloſe an examination before the privy council; or, to adviſe a priſoner to ſtand mute (all of which are impediments of juſtice); are high miſpriſions, and contempts of the king's courts, and puniſhable by fine and impriſonment. And antiently it was held, that if one of the grand jury diſcloſed to any perſon indicted the evidence that appeared againſt him, he was thereby made acceſſory to the offence, if felony; and in treaſon, a principal. And at this day it is agreed, that he is guilty of a high miſpriſion[e], and liable to be fined and impriſoned[f] (4).

[e] See Bar. 212. 27 Aſſ. pl. 44. § 4. fol. 138.
[f] 1 Hawk. P. C. 59.

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(4) A few years ago at York a gentleman of the grand jury heard a witneſs ſwear in court, upon the trial of a priſoner, directly contrary to the evidence which he had given before the grand jury. He immediately communicated the circumſtance to the judge, who, upon conſulting the judge in the other court, was of opinion that public juſtice in this caſe required that the evidence which the witneſs had given before the grand jury ſhould be diſcloſed, and the witneſs was committed for perjury to be tried upon the teſtimony of the gentlemen of the grand jury. It was held the object of this concealment was only to prevent the teſtimony produced before them from being counteracted by ſubornation of perjury on the part of the perſons againſt whom bills were found. This is a privilege which may be waived by the crown. *See p.* 303. (*n.* 1.) *poſt.*

CHAPTER THE TENTH.

OF OFFENCES AGAINST PUBLIC JUSTICE.

THE order of our diſtribution will next lead us to take into conſideration ſuch crimes and miſdemeſnors as more eſpecially affect the *common-wealth*, or public polity of the kingdom: which however, as well as thoſe which are peculiarly pointed againſt the lives and ſecurity of private ſubjects, are alſo offences againſt the king, as the *pater-familias* of the nation: to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing thoſe laws, which the people themſelves in conjunction with him have enacted; or at leaſt have conſented to, by an agreement either expreſsly made in the perſons of their repreſentatives, or by a tacit and implied conſent preſumed and proved by immemorial uſage.

THE ſpecies of crimes, which we have now before us, is ſubdivided into ſuch a number of inferior and ſubordinate claſſes, that it would much exceed the bounds of an elementary treatiſe, and be inſupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy. I ſhall therefore confine myſelf principally to general definitions or deſcriptions of this great variety of offences, and to the puniſhments inflicted by law for each particular offence; with now and then a few incidental obſervations: referring the ſtudent for more particulars to other voluminous authors; who have treated of theſe ſubjects with

with greater preciſion and more in detail, than is conſiſtent with the plan of theſe commentaries.

THE crimes and miſdemeſnors that more eſpecially affect the common-wealth, may be divided into five ſpecies; *viz.* offences againſt public *juſtice*, againſt the public *peace*, againſt [128] public *trade*, againſt the public *health*, and againſt the public *police* or *oeconomy*: of each of which we will take a curſory view in their order.

FIRST then, of offences againſt public *juſtice*: ſome of which are felonious, whoſe puniſhment may extend to death; others only miſdemeſnors. I ſhall begin with thoſe that are moſt penal, and deſcend gradually to ſuch as are of leſs malignity.

1. IMBEZZLING or vacating *records*, or falſifying certain other proceedings in a court of judicature, is a felonious offence againſt public juſtice. It is enacted by ſtatute 8 Hen. VI. c. 12. that if any clerk, or other perſon, ſhall wilfully take away, withdraw, or avoid any record, or proceſs in the ſuperior courts of juſtice in Weſtminſter-hall, by reaſon whereof the judgment ſhall be reverſed or not take effect; it ſhall be felony not only in the principal actors, but alſo in their procurers and abettors. And this may be tried either in the king's bench or common pleas, by a jury *de medietate*; half officers of any of the ſuperior courts, and the other half common jurors. Likewiſe by ſtatute 21 Jac. I. c. 26. to acknowlege any fine, recovery, deed enrolled, ſtatute, recognizance, bail, or judgment, in the name of another perſon not privy to the ſame, is felony without benefit of clergy. Which law extends only to proceedings in the courts themſelves: but by ſtatute 4 W. & M. c. 4. to perſonate any other perſon (as bail) before any judge of aſſize or other commiſſioner authorized to take bail in the country, is alſo felony. For no man's property would be ſafe, if records might be ſuppreſſed or falſified, or perſons names be falſely uſurped in courts, or before their public officers.

2. To prevent abuſes by the extenſive power, which the law is obliged to repoſe in gaolers, it is enacted by ſtatute 14 Edw. III. c. 10. that if any *gaoler* by too great dureſs of impriſonment makes any priſoner, that he hath in ward, be-
[129] come an *approver* or an *appellor* againſt his will; that is, as we ſhall ſee hereafter, to accuſe and turn evidence againſt ſome other perſon; it is felony in the gaoler. For, as ſir Edward Coke obſerves [a], it is not lawful to induce or excite any man even to a juſt accuſation of another; much leſs to do it by dureſs of impriſonment; and leaſt of all by a gaoler, to whom the priſoner is committed for ſafe cuſtody.

3. A THIRD offence againſt public juſtice is *obſtructing* the execution of lawful *proceſs*. This is at all times an offence of a very high and preſumptuous nature; but more particularly ſo, when it is an obſtruction of an arreſt upon criminal proceſs. And it hath been holden, that the party oppoſing ſuch arreſt becomes thereby *particeps criminis:* that is, an acceſſory in felony, and a principal in high treaſon [b]. Formerly one of the greateſt obſtructions to public juſtice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent perſons aſſembled together to ſhelter themſelves from juſtice, (eſpecially in London and Southwark,) under the pretext of their having been antient palaces of the crown, or the like [c]: all of which ſanctuaries for iniquity are now demoliſhed, and the oppoſing of any proceſs therein is made highly penal, by the ſtatutes 8 & 9 Will. III. c. 27. 9 Geo. I. c. 28. and 11 Geo. I. c. 22. which enact, that perſons oppoſing the execution of any proceſs in ſuch pretended privileged places within the bills of mortality, or abuſing any officer in his endeavours to execute his duty therein, ſo that he receives bodily hurt, ſhall be guilty of felony, and tranſported for ſeven years: and perſons in diſguiſe, joining in or abetting any riot or tumult on ſuch account, or oppoſing any proceſs, or aſſaulting and abuſing

[a] 3 Inſt. 91.
[b] 2 Hawk. P. C. 121.
[c] Such as *White-Friers*, and it's environs; the *Savoy*; and the *Mint* in Southwark.

any

any officer executing or for having executed the ſame, ſhall be felons without benefit of clergy.

4. An *eſcape* of a perſon arreſted upon criminal proceſs, by eluding the vigilance of his keepers before he is put in hold, is alſo an offence againſt public juſtice, and the party himſelf is puniſhable by fine or impriſonment [d]. But the officer permitting ſuch eſcape, either by negligence or connivance, is much more culpable than the priſoner; the natural deſire of liberty pleading ſtrongly in his behalf, though he ought in ſtrictneſs of law to ſubmit himſelf quietly to cuſtody, till cleared by the due courſe of juſtice. Officers therefore who, after arreſt, *negligently* permit a felon to eſcape, are alſo puniſhable by fine [e]: but *voluntary* eſcapes, by conſent and connivance of the officer, are a much more ſerious offence: for it is generally agreed that ſuch eſcapes amount to the ſame kind of offence, and are puniſhable in the ſame degree, as the offence of which the priſoner is guilty, and for which he is in cuſtody, whether treaſon, felony, or treſpaſs. And this whether he were actually committed to gaol, or only under a bare arreſt [f]. But the officer cannot be thus puniſhed, till the original delinquent hath actually received judgment or been attainted upon verdict, confeſſion, or outlawry, of the crime for which he was ſo committed or arreſted: otherwiſe it might happen, that the officer might be puniſhed for treaſon or felony, and the perſon arreſted and eſcaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and impriſoned for a miſdemeſnor [g]. [130]

5. Breach of priſon by the offender himſelf, when committed for any cauſe, was felony at the common law [h]: or even conſpiring to break it [i]. But this ſeverity is mitigated by the ſtatute *de frangentibus priſonam*, 1 Edw. II. which

[d] 2 Hawk. P. C. 122.
[e] 1 Hal. P. C. 600.
[f] 1 Hal. P. C. 590. 2 Hawk. P. C. 134.
[g] 1 Hal. P. C. 588, 9. 2 Hawk. P. C. 134, 5.
[h] 1 Hal. P. C. 607.
[i] Bract. *l.* 3. *c.* 9.

enacts, that no perſon ſhall have judgment of life or member for breaking priſon, unleſs committed for ſome capital offence. So that to break priſon and eſcape, when lawfully committed for any treaſon or felony, remains ſtill felony as at the common law; and to break priſon, (whether it be the county gaol, the ſtocks, or other uſual place of ſecurity,) when lawfully confined upon any other inferior charge, is ſtill puniſhable as a high miſdemeſnor by fine and impriſonment. For the ſtatute, which ordains that ſuch offence
[131] ſhall be no longer capital, never meant to exempt it entirely from every degree of puniſhment [j].

6. RESCUE is the forcibly and knowingly freeing another from an arreſt or impriſonment; and it is generally the ſame offence in the ſtranger ſo reſcuing, as it would have been in a gaoler to have *voluntarily* permitted an eſcape. A reſcue therefore of one apprehended for felony, is felony; for treaſon, treaſon; and for a miſdemeſnor, a miſdemeſnor alſo. But here likewiſe, as upon voluntary eſcapes, the principal muſt firſt be attainted or receive judgment before the reſcuer can be puniſhed: and for the ſame reaſon; becauſe perhaps in fact it may turn out that there has been no offence committed [k]. By ſtatute 11 Geo. II. c. 26. and 24 Geo. II. c. 40 if five or more perſons aſſemble to reſcue any retailers of ſpirituous liquors, or to aſſault the informers againſt them, it is felony, and ſubject to tranſportation for ſeven years. By the ſtatute 16 Geo. II. c. 31. to convey to any priſoner in cuſtody for treaſon or felony any arms, inſtruments of eſcape, or diſguiſe, without the knowlege of the gaoler, though no eſcape be attempted, or any way to aſſiſt ſuch priſoner to attempt an eſcape, though no eſcape be actually made, is felony, and ſubjects the offender to tranſportation for ſeven years: or if the priſoner be in cuſtody for petit larceny or other inferior offence, or charged with a debt of 100 *l.* it is then a miſdemeſnor, puniſhable with fine and impriſonment. And by ſeveral ſpecial ſta-

[j] 2 Hawk. P. C. 128.

[k] 1 Hal. P. C. 607. Foſt. 344.

tutes,

tutes [1], to reſcue or attempt to reſcue, any perſon committed for the offences enumerated in thoſe acts, is felony without benefit of clergy; and to reſcue, or attempt to reſcue, the body of a felon executed for murder, is ſingle felony, and ſubject to tranſportation for ſeven years. Nay, even if any perſon be charged with any of the offences againſt the black-act, 9 Geo. I. c. 22. and, being required by order of the privy council to ſurrender himſelf, neglects ſo to do for forty days, both he and all that knowingly conceal, aid, abet, or ſuccour him, are felons without benefit of clergy.

7. ANOTHER capital offence againſt public juſtice is the [132] *returning from tranſportation*, or being ſeen at large in Great Britain, before the expiration of the term for which the offender was ordered to be tranſported, or had agreed to tranſport himſelf. This is made felony without benefit of clergy in all caſes, by ſtatutes 4 Geo. I. c. 11. 6 Geo. I. c. 23. 16 Geo. II. c. 15. and 8 Geo. III. c. 15. as is alſo the aſſiſting them to eſcape from ſuch as are conveying them to the port of tranſportation (1).

8. AN eighth is that of *taking a reward*, under pretence of *helping* the owner to his *ſtolen goods*. This was a contrivance

[1] 6 Geo. I. c. 23. (Tranſportation.) 9 Geo. I. c. 22. (Black-act.) 8 Geo. II. c. 20. (Deſtroying turnpikes, &c.) 19 Geo. II. c. 34. (Smuggling.) 25 Geo. II. c. 37. (Murder.) 27 Geo. II. c. 15. (Black-act.)

(1) It has been thought that, where a convict has been pardoned upon condition of tranſporting himſelf for life or a certain number of years, if he did not comply with that condition, he might be remitted to his original ſentence, and in ſome caſes that he was ſubject to no other puniſhment. See *Leach's Crown Caſes*, 197. 303. But the 24 Geo. III. c. 56. ſeems to include every poſſible caſe, by enacting, that if any offender ſhall be ordered by the court to be tranſported, or ſhall agree to tranſport himſelf on certain conditions, either for life or any number of years, and ſhall be afterwards at large before the expiration of the term, without lawful cauſe, in any part of Great Britain or Ireland, he ſhall, being lawfully convicted thereof, ſuffer death without benefit of clergy.

carried

carried to a great length of villany in the beginning of the reign of George the firſt: the confederates of the felons thus diſpoſing of ſtolen goods, at a cheap rate, to the owners themſelves, and thereby ſtifling all farther inquiry. The famous Jonathan Wild had under him a well-diſciplined corps of thieves who brought in all their ſpoils to him; and he kept a ſort of public office for reſtoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public juſtice, it was enacted by ſtatute 4 Geo. I. c. 11. that whoever ſhall take a reward under the pretence of helping any one to ſtolen goods, ſhall ſuffer as the felon who ſtole them; unleſs he cauſes ſuch principal felon to be apprehended and brought to trial, and alſo gives evidence againſt them. Wild, ſtill continuing in his old practice, was upon this ſtatute at laſt convicted and executed[m].

9. Receiving of ſtolen goods, *knowing them to be ſtolen*, is alſo a high miſdemeſnor and affront to public juſtice. We have ſeen in a former chapter[n], that this offence, which is only a miſdemeſnor at common law, by the ſtatute 3 & 4 W. & M. c. 9. and 5 Ann. c. 31. makes the offender acceſſory to the theft and felony. But becauſe the acceſſory cannot in general be tried, unleſs with the principal or after the principal is convicted, the receivers by that means frequently eluded juſtice. To remedy which, it is enacted by ſtatute 1 Ann. c. 9. and 5 Ann. c. 31. that ſuch receivers may ſtill be proſecuted for a miſdemeſnor, and puniſhed by fine and impriſonment, though the principal felon be not before taken
[133] ſo as to be proſecuted and convicted. And, in caſe of receiving ſtolen lead, iron, and certain other metals, ſuch offence is by ſtatute 29 Geo. II. c. 30. puniſhable by tranſportation for fourteen years[o]. So that now the proſecutor has two methods in his choice: either to puniſh the receivers for the miſdemeſnor immediately, before the thief is taken[p]; or

[m] See ſtat. 6 Geo. I. c. 23. § 9.

[n] See pag. 38.

[o] See alſo ſtatute 2 Geo. III. c. 28. § 12. for the puniſhment of receivers of goods ſtolen by bum-boats, &c. in the Thames.

[p] Foſter, 373.

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to wait till the felon is convicted, and then punish them as accessories to the felony. But it is provided by the same statutes, that he shall only make use of one, and not both of these methods of punishment. By the same statute also 29 Geo. II. c. 30. persons having lead, iron, and other metals in their custody, and not giving a satisfactory account how they came by the same, are guilty of a misdemesnor and punishable by fine or imprisonment. And by statute 10 Geo. III. c. 48. all knowing receivers of stolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the stealing, may be tried as well before as after the conviction of the principal, and whether he be in or out of custody; and, if convicted, shall be adjudged guilty of felony, and transported for fourteen years (2).

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(2) By the common law, the receiving of stolen goods was a misdemesnor; but by the 3 W. & M. c. 9. the buyer or receiver of stolen goods was made an accessory after the fact, and from that time the common law misdemesnor became merged in the felony. By the 4 Geo. I. c. 11. persons convicted of buying or receiving stolen goods, knowing them to be stolen, may be transported for fourteen years. But this statute has a reference to the former statutes, by which receivers are made accessories, and as there can be no accessories to petty larceny, this statute has operation only in cases where the principal is previously convicted of grand larceny. *Fost.* 73. 378. And as these statutes did not extend to the receivers of stolen goods, where the principal was guilty only of petty larceny, the 22 Geo. III. c. 5. was passed, which comprehends all descriptions of receivers whatever, it expressly excepts the receivers of lead, iron, copper, brass, bell-metal, and solder, who are punishable by 29 Geo. II. c. 30. by transportation for fourteen years, and also the case where the principal has been convicted of grand larceny, or some greater offence, in that instance the receiver must still be prosecuted as an accessory to the felony; and by the 4 Geo. I. c. 11. must be transported for fourteen years. But in every other instance, whether the principal has committed petty larceny, grand larceny, or some greater offence, the receiver may be prosecuted for a misdemesnor,

10. OF a nature ſomewhat ſimilar to the two laſt is the offence of *theft bote*, which is where the party robbed not only knows the felon, but alſo takes his goods again, or

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miſdemeſnor, and be puniſhed by fine, impriſonment, or whipping, whether the principal felon be, or be not, convicted, or be, or be not, amenable to juſtice. And every perſon, under fifteen years of age, guilty of any felony within benefit of clergy, ſhall be entitled to a pardon, if he makes ſuch a diſcovery as produces the conviction of two perſons guilty of buying or receiving ſtolen goods. It has been determined that money and bank notes are not goods within the meaning of theſe ſtatutes. *Leach*, 208. 368. Upon the trial of the receiver, the principal felon may be admitted a witneſs. *Leach*, 325. When the 3 & 4 W. & M. c. 9. had made the receiver of ſtolen goods an acceſſory after the fact, his puniſhment in the caſe of grand larceny, was the ſame at that time as that of the principal, *viz.* burning in the hand, and impriſonment not exceeding a year: but the puniſhment of the principal by the 4 Geo. I. c. 11. might be changed at the diſcretion of the court into tranſportation for ſeven years; but it ſeemed to be underſtood till lately, that the clauſe in that ſtatute reſpecting the receiver was imperative, and that the court was obliged to ſentence him to tranſportation for fourteen years. *Foſt.* 73.

The words in the firſt clauſe reſpecting the principal, are *it ſhall and may be lawful for the court, if they think fit*, inſtead of burning in the hand, to order the offender to be tranſported for ſeven years. In the clauſe reſpecting the receiver, the ſame words, *it ſhall and may be lawful*, are repeated, though the words, *if they think fit*, are omitted.

But ſtill it ſeems to have been left to the diſcretion of the Judge, whether he would adopt the former puniſhment of burning in the hand, with impriſonment for not more than a year, or the new puniſhment of tranſportation for fourteen years.

Then by the 19 Geo. III. c. 74. the burning in the hand may be changed into a pecuniary fine, or whipping not oftener than thrice.

This I am aſſured is the conſtruction now put upon the ſtatute by ſeveral able Judges.

Tranſ-

other amends, upon agreement not to profecute. This is frequently called compounding of felony, and formerly was held to make a man an acceffory; but is now punifhed only with fine and imprifonment [q]. This perverfion of juftice, in the old Gothic conftitutions, was liable to the moft fevere and infamous punifhment. And the Salic law, "*latroni eum fimilem habuit, qui furtum celare vellet, et "occulte fine judice compofitionem ejus admittere* [r]." By ftatute 25 Geo. II. c. 36. even to advertife a reward for the return of things ftolen, with no queftions afked, or words to the fame purport, fubjects the advertifer and the printer to a forfeiture of 50 *l.* each.

11. COMMON *barretry* is the offence of frequently exciting and ftirring up fuits and quarrels between his majefty's fubjects, either at law or otherwife [s]. The punifhment for this offence, in a common perfon, is by fine and imprifonment: but if the offender (as is too frequently the cafe) belongs to the profeffion of the law, a barretor, who is thus able as well as willing to do mifchief, ought alfo to be difabled from practifing for the future [t]. And indeed it is enacted by ftatute 12 Geo. I. c. 29. that if any one, who hath been convicted of forgery, perjury, fubornation of perjury, or common barretry, fhall practife as an attorney,

[q] 1 Hawk. P. C. 125.
[r] Stiernh. *de jure Goth. l.* 3. *c.* 5.
[s] 1 Hawk. P. C. 243.
[t] 1 Hawk. P. C. 244.

Tranfportation for fourteen years feems too fevere a punifhment for a flight offence of this nature.

In an indictment for a mifdemefnor, containing a count which ftates the things ftolen of fuch a value as makes the offence grand larceny in the principal, it is not neceffary to aver that the principal has not been before convicted; but if the defendant can fhew that he has been before convicted, the receiver muft be acquitted upon that indictment, though he would fubject himfelf to be tried upon another indictment, and upon conviction would be liable to tranfportation for fourteen years. 5 *T. R.* 83.

 folicitor,

ſolicitor, or agent, in any ſuit; the court, upon complaint, ſhall examine it in a ſummary way; and, if proved, ſhall direct the offender to be tranſported for ſeven years. Hereunto may alſo be referred another offence, of equal malignity and audaciouſneſs; that of ſuing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the ſuit. This offence, if committed in any of the king's ſuperior courts, is left, as a high contempt, to be puniſhed at their diſcretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extenſive, it is directed by ſtatute 8 Eliz. c. 2. to be puniſhed by ſix months impriſonment, and treble damages to the party injured.

12. MAINTENANCE is an offence that bears a near relation to the former; being an officious intermeddling in a
[135] ſuit that no way belongs to one, by maintaining or aſſiſting either party with money or otherwiſe, to proſecute or defend it [u]: a practice that was greatly encouraged by the firſt introduction of uſes [w]. This is an offence againſt public juſtice, as it keeps alive ſtrife and contention, and perverts the remedial proceſs of the law into an engine of oppreſſion. And therefore, by the Roman law, it was a ſpecies of the *crimen falſi* to enter into any confederacy, or do any act to ſupport another's lawſuit, by money, witneſſes, or patronage [x]. A man may however maintain the ſuit of his near kinſman, ſervant, or poor neighbour, out of charity and compaſſion, with impunity. Otherwiſe the puniſhment by common law is fine and impriſonment [y]; and by the ſtatute 32 Hen. VIII. c. 9. a forfeiture of ten pounds.

13. CHAMPERTY, *campi-partitio*, is a ſpecies of maintenance, and puniſhed in the ſame manner [z]: being a bargain

[u] 1 Hawk. P. C. 249.
[w] Dr. & St. 203.
[x] *Ff.* 48. 10. 20.
[y] 1 Hawk. P. C. 255.
[z] *Ibid.* 257.

with

with a plaintiff or defendant *campum partire*, to divide the land or other matter fued for between them, if they prevail at law; whereupon the champertor is to carry on the party's fuit at his own expence [a]. Thus *champart*, in the French law, fignifies a fimilar diviſion of profits, being a part of the crop annually due to the landlord by bargain or cuſtom. In our ſenſe of the word, it ſignifies the purchaſing of a ſuit, or right of ſuing: a practice ſo much abhorred by our law, that it is one main reaſon why a *choſe* in action, or thing of which one hath the right but not the poſſeſſion, is not aſſignable at common law; becauſe no man ſhould purchaſe any pretence to ſue in another's right. Theſe peſts of civil ſociety, that are perpetually endeavouring to diſturb the repoſe of their neighbours, and officiouſly interfering in other men's quarrels, even at the hazard of their own fortunes, were ſeverely animadverted on by the Roman law: "*qui improbe coeunt in alienam litem, ut quic-*" *quid ex condemnatione in rem ipſius redactum fuerit inter eos* " *communicaretur, lege Julia de vi privata tenentur* [b];" and they were puniſhed by the forfeiture of a third part of their goods, and perpetual infamy. Hitherto alſo muſt be [136] referred the proviſion of the ſtatute 32 Hen. VIII. c. 9. that no one ſhall ſell or purchaſe any pretended right or title to land, unleſs the vendor hath received the profits thereof for one whole year before ſuch grant, or hath been in actual poſſeſſion of the land, or of the reverſion or remainder; on pain that both purchaſor and vendor ſhall each forfeit the value of ſuch land to the king and the proſecutor. Theſe offences relate chiefly to the commencement of *civil* ſuits: but

14. THE *compounding of informations* upon penal ſtatutes are an offence of an equivalent nature in *criminal* cauſes; and are, beſides, an additional miſdemeſnor againſt public juſtice, by contributing to make the laws odious to the people. At once therefore to diſcourage malicious in-

[a] Stat. of conſpirat. 33 Edw. I. [b] *Ff.* 48. 7. 6.

formers,

formers, and to provide that offences, when once discovered, shall be duly prosecuted, it is enacted by statute 18 Eliz. c. 5. that if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him, (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good (3),) he shall forfeit 10 *l.* shall stand two hours on the pillory, and shall be for ever disabled to sue on any popular or penal statute.

15. A CONSPIRACY also to indict an innocent man of felony falsely and maliciously, who is accordingly indicted and acquitted, is a farther abuse and perversion of public justice; for which the party injured may either have a civil action by writ of conspiracy, (of which we spoke in the preceding book [c],) or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king, and were by the antient common law [d] to receive what is called the *villenous* judgment; *viz.* to lose their *liberam legem*, whereby they are discredited and disabled as jurors or witnesses; to forfeit their goods and chattels, and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison [e]. But it now is the better opinion, that
[137] the villenous judgment is by long disuse become obsolete; it not having been pronounced for some ages: but instead thereof the delinquents are usually sentenced to imprisonment, fine, and pillory (4). To this head may be referred

[c] See vol. III. pag. 126.
[d] Bro. *Abr. tit. conspiracy.* 28.
[e] 1 Hawk. P. C. 193.

(3) But this severe statute extends even to penal actions, where the whole penalty is given to the prosecutor.

(4) Every confederacy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy. Journeymen who refuse to work, in consequence of a combination, till

the offence of ſending letters, threatening to accuſe any perſon of a crime puniſhable with death, tranſportation, pillory, or other infamous puniſhment, with a view to extort from him any money or other valuable chattels. This is puniſhable by ſtatute 30 Geo. II. c. 24. at the diſcretion of

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till their wages are raiſed, may be indicted for a conſpiracy. 1 *Leach. Hawk.* 348. But by the 40 Geo. III. c. 106. any two juſtices of the peace have cognizance of offences of this kind, and may upon conviction puniſh the offenders by impriſonment in the county gaol for three months, or by impriſonment and hard labour in the houſe of correction for two months.—One perſon alone cannot be guilty of a conſpiracy; but one perſon may be proſecuted for having conſpired with others, and may be tried and convicted alone. 1 *Str.* 193. In a proſecution for a conſpiracy, the actual fact of conſpiring need not be proved, but it may be inferred from circumſtances, and the concurring conduct of the defendants. 1 *Bl. Rep.* 392.—In the caſe of William Stone, who was indicted for high treaſon, *viz.* for compaſſing the death of the king, and for adhering to his enemies, the overt act to which the evidence chiefly applied was the conſpiring with John Stone, William Jackſon, and others unknown, to collect intelligence, and to communicate it to the enemy for their aid and inſtruction. And the Attorney-General advanced this poſition, which was admitted by the Court: "that, as the overt act "charged was a conſpiracy, of which proof was already before "the Court, the act of each conſpirator in the proſecution of "ſuch conſpiracy was evidence againſt all; that it had been ſo "determined by Mr. J. Buller in the caſe of *The King* v. *Bowes* "*and others*, who were convicted for a conſpiracy to carry away "Lady Strathmore; and that the ſame principle had been alſo "ſettled in *The King* v. *Hardy*, and *The King* v. *Tooke*, at the "Old Bailey in 1794."—A conſpiracy has been ſaid to be comprehended under the denomination of *crimen falſi*, and a perſon convicted of it is held to be rendered an incompetent witneſs. *Leach.* 349. But this is only true of conſpiracies, the object of which is to injure by fraud, falſehood, or perjury; for Mr. Bowes and the others convicted with him were afterwards held to be competent witneſſes by the court of delegates.

the court, with fine, imprisonment, pillory, whipping, or transportation for seven years.

16. THE next offence against public justice is when the suit is past it's commencement, and come to trial. And that is the crime of wilful and corrupt *perjury*: which is defined by sir Edward Coke [f], to be a crime committed when a *lawful* oath is administered, in some *judicial* proceeding, to a person who swears *wilfully*, *absolutely*, and *falsely*, in a matter *material* to the issue or point in question. The law takes no notice of any perjury but such as is committed in some court of justice, having power to administer an oath; or before some magistrate or proper officer, invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution: for it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them (5). For which reason it is much to be questioned, how far any magistrate is justifiable in taking a voluntary *affidavit* in any extrajudicial matter, as is now too frequent upon every petty occasion: since it is more than possible, that by such idle oaths a man may frequently *in foro conscientiae* incur the guilt, and at the same time

[f] 3 Inst. 164.

(5) Where an oath is required by an act of parliament, but not in a judicial proceeding, the breach of that oath does not seem to amount to perjury, unless the statute enacts that such oath, when false, shall be perjury, or shall subject the offender to the penalties of perjury.

It is remarkable that the house of commons have no power to administer an oath, except in those particular instances in which that power is granted to them by express acts of parliament. It is supposed that the reason they have never obtained the general authority of administering an oath, is owing to the jealousy of the upper house, which, by securing this privilege to itself, prevents the commons from participating in the judicature of parliament.

evade

evade the temporal penalties, of perjury. The perjury must also be corrupt, (that is, committed *malo animo*,) wilful, positive, and absolute; not upon surprize, or the like: it also must be in some point material to the question in dispute; for if it only be in some trifling collateral circumstance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before mentioned (6). *Subornation* of perjury is the offence of procuring another to take such a false oath, as constitutes perjury in the prin- [138] cipal. The punishment of perjury and subornation, at common law, has been various. It was antiently death; afterwards banishment, or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony [g]. But the statute 5 Eliz. c. 9. (if the offender be prosecuted thereon) inflicts the penalty of perpetual infamy, and a fine of 40 *l.* on the suborner: and in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months imprisonment, perpetual infamy, and a fine of 20 *l.* or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offence at common law; especially as, to the penalties before inflicted, the statute 2 Geo. II. c. 25. superadds a power, for the court to order the offender to be sent to the house of correction for a term not exceeding seven years, or to be transported for the same period; and makes it felony without benefit of clergy to return or escape within the time. It has sometimes been wished, that perjury, at least upon capital accusations, whereby another's life has been or might have been destroyed, was also rendered capital, upon a principle of retaliation; as it is in all cases by the laws of France [h].

[g] 3 Inst. 163. [h] Montesq. Sp. L. b. 29. c. 11.

(6) A man may be indicted for perjury in swearing that he *believes* a fact to be true, which he must know to be false. *Leach.* 270.

And certainly the odiouſneſs of the crime pleads ſtrongly in behalf of the French law. But it is to be conſidered, that there they admit witneſſes to be heard only on the ſide of the proſecution, and uſe the rack to extort a confeſſion from the accuſed. In ſuch a conſtitution therefore it is neceſſary to throw the dread of capital puniſhment into the other ſcale, in order to keep in awe the witneſſes for the crown; on whom alone the priſoner's fate depends; ſo naturally does one cruel law beget another. But corporal and pecuniary puniſhments, exile, and perpetual infamy, are more ſuited to the genius of the Engliſh law: where the fact is openly diſcuſſed between witneſſes on *both* ſides, and the evidence for the crown may be contradicted and diſproved by thoſe of the priſoner. Where in-
[139] deed the death of an innocent perſon has actually been the conſequence of ſuch wilful perjury, it falls within the guilt of deliberate murder, and deſerves an equal puniſhment: which our antient law in fact inflicted [i]. But the mere attempt to deſtroy life by other means not being capital, there is no reaſon that an attempt by perjury ſhould; much leſs that this crime ſhould in *all* judicial caſes be puniſhed with death. For to multiply capital puniſhments leſſens their effect, when applied to crimes of the deepeſt dye; and, deteſtable as perjury is, it is not by any means to be compared with ſome other offences, for which only death can be inflicted; and therefore it ſeems already (except perhaps in the inſtance of deliberate murder by perjury) very properly puniſhed by our preſent law, which has adopted the opinion of Cicero [k], derived from the law of the twelve tables, "*perjurii poena divina, exitium; humana, dedecus* (7)."

17. BRIBERY is the next ſpecies of offence againſt public juſtice; which is when a judge, or other perſon concerned in the adminiſtration of juſtice, takes any undue reward to

[i] Britton. c. 5. [k] *de Leg.* 2. 9.

(7) See this ſubject further diſcuſſed in p. 196. *poſt.*

influence

influence his behaviour in his office [l]. In the eaſt it is the cuſtom never to petition any ſuperior for juſtice, not excepting their kings, without a preſent. This is calculated for the genius of deſpotic countries; where the true principles of government are never underſtood, and it is imagined that there is no obligation from the ſuperior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many ſevere injunctions againſt bribery, as well for ſelling a man's vote in the ſenate or other public aſſembly, as for the bartering of common juſtice, yet, by a ſtrange indulgence in one inſtance, it tacitly encouraged this practice; allowing the magiſtrate to receive ſmall preſents, provided they did not in the whole exceed a hundred crowns in the year [m]: not conſidering the inſinuating nature and gigantic progreſs of this vice, when once admitted. Plato therefore more wiſely, in his ideal republic [n], orders thoſe who take preſents for doing [140] their duty to be puniſhed in the ſevereſt manner: And by the laws of Athens he that offered was alſo proſecuted, as well as he that received a bribe [o]. In England this offence of taking bribes is puniſhed, in inferior officers, with fine and impriſonment; and in thoſe who offer a bribe, though not taken, the ſame [p]. But in judges, eſpecially the ſuperior ones, it hath been always looked upon as ſo heinous an offence, that the chief juſtice Thorpe was hanged for it in the reign of Edward III. By a ſtatute [q] 11 Hen. IV. all judges and officers of the king, convicted of bribery, ſhall forfeit treble the bribe, be puniſhed at the king's will, and be diſcharged from the king's ſervice for ever. And ſome notable examples have been made in parliament, of perſons in the higheſt ſtations, and otherwiſe very eminent and able, but contaminated with this ſordid vice (8).

[l] 1 Hawk. P. C. 168.
[m] *Ff.* 48. 11. 6.
[n] *de Leg. l.* 12.
[o] Pott. Antiq. b. 1. c. 23.
[p] 3 Inſt. 147.
[q] *Ibid.* 146.

(8) It was held to be a miſdemeſnor to offer a ſum of money to the firſt lord of the treaſury, for the purpoſe of obtaining an office or appointment under government, by his intereſt and recommendation. 4 *Burr.* 2498. For bribery at elections, ſee 1 vol. p. 179.

18. EMBRACERY is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like[r]. The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes of the reign of Edward III.) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

19. THE *false verdict* of jurors, whether occasioned by embracery or not, was antiently considered as criminal, and therefore exemplarily punished by attaint in the manner formerly mentioned[s].

20. ANOTHER offence of the same species is the *negligence of public officers*, entrusted with the administration of justice, as sheriffs, coroners, constables, and the like, which makes the offender liable to be fined; and in very notorious cases will amount to a forfeiture of his office, if it be a beneficial
[141] one[t]. Also the omitting to apprehend persons offering stolen iron, lead, and other metals to sale, is a misdemesnor, and punishable by a stated fine, or imprisonment, in pursuance of the statute 29 Geo. II. c. 30.

21. THERE is yet another offence against public justice, which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the *oppression* and tyrannical partiality of judges, justices, and other *magistrates*, in the administration and under the colour of their office. However, when prosecuted, either by impeachment in parliament, or by information in the court of king's bench, (according to the rank of the offenders,) it is sure to be severely punished with forfeiture of their offices, (either consequential or immediate,) fines, imprisonment, or other

[r] 1 Hawk. P. C. 259.
[s] See Vol. III. pag. 402, 403.
[t] 1 Hawk. P. C. 168.

discre-

discretionary censure, regulated by the nature and aggravations of the offence committed (9).

22. LASTLY, *extortion* is an abuse of public justice, which consists in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before it is due [u]. The punishment is fine and imprisonment, and sometimes a forfeiture of the office.

[u] 1 Hawk. P. C. 170.

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(9) For actions and prosecutions against justices of the peace, see 1 vol. p. 354. n. 17.

CHAPTER THE ELEVENTH.

OF OFFENCES AGAINST THE PUBLIC PEACE.

WE are next to conſider offences againſt the public *peace;* the conſervation of which is intruſted to the king and his officers, in the manner and for the reaſons which were formerly mentioned at large [a]. Theſe offences are either ſuch as are an actual breach of the peace; or conſtructively ſo, by tending to make others break it. Both of theſe ſpecies are alſo either felonious, or not felonious. The felonious breaches of the peace are ſtrained up to that degree of malignity by virtue of ſeveral modern ſtatutes: and, particularly,

1. THE *riotous aſſembling* of *twelve* perſons, or more, and not diſperſing upon proclamation. This was firſt made high treaſon by ſtatute 3 & 4 Edw. VI. c. 5. when the king was a minor, and a change in religion to be effected: but that ſtatute was repealed by ſtatute 1 Mar. c. 1. among the other treaſons created ſince the 25 Edw. III.; though the prohibition was in ſubſtance re-enacted, with an inferior degree of puniſhment, by ſtatute 1 Mar. ſt. 2. c. 12. which made the ſame offence a ſingle felony. Theſe ſtatutes ſpecified and particularized the nature of the riots they were meant to ſuppreſs; as, for example, ſuch as were ſet on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other ſpecific purpoſes:

[a] Vol. I. pag. 118. 268. 350.

in

in which cafes, if the perfons were commanded by proclamation to diſperſe; and they did not, it was by the ſtatute of Mary made felony, but within the benefit of clergy; and alſo the act indemnified the peace officers and their aſſiſtants, if they killed any of the mob in endeavouring to ſuppreſs ſuch riot. This was thought a neceſſary ſecurity in that ſanguinary reign, when popery was intended to be re-eſtabliſhed, which was like to produce great diſcontents: but at firſt it [143] was made only for a year, and was afterwards continued for that queen's life. And, by ſtatute 1 Eliz. c. 16. when a reformation in religion was to be once more attempted, it was revived and continued during her life alſo; and then expired. From the acceſſion of James the firſt to the death of queen Anne, it was never once thought expedient to revive it: but, in the firſt year of George the firſt, it was judged neceſſary, in order to ſupport the execution of the act of ſettlement, to renew it, and at one ſtroke to make it perpetual, with large additions. For, whereas the former acts expreſsly defined and ſpecified what ſhould be accounted a riot, the ſtatute 1 Geo. I. c. 5. enacts, generally, that if any twelve perſons are unlawfully aſſembled to the diſturbance of the peace, and any one juſtice of the peace, ſheriff, under-ſheriff, or mayor of a town, ſhall think proper to command them by proclamation to diſperſe, if they contemn his orders and continue together for one hour afterwards, ſuch contempt ſhall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force oppoſed, or the reader be in any manner wilfully hindered from the reading of it, ſuch oppoſers and hinderers are felons without benefit of clergy: and all perſons to whom ſuch proclamation *ought to have been made*, and knowing of ſuch hinderance, and not diſperſing, are felons without benefit of clergy. There is the like indemnifying clauſe, in caſe any of the mob be unfortunately killed in the endeavour to diſperſe them; being copied from the act of queen Mary. And, by a ſubſequent clauſe of the new act, if any perſon, ſo riotouſly aſſembled, begin even before proclamation to pull down any church, chapel, meeting-

ing-houſe, dwelling-houſe, or out-houſes, they ſhall be felons without benefit of clergy (1).

2. By ſtatute 1 Hen. VII. c. 7. *unlawful hunting* in any legal foreſt, park, or warren, not being the king's property, *by night*, or with *painted faces*, was declared to be ſingle felony. But now by the ſtatute 9 Geo. I. c. 22. to appear armed in any incloſed foreſt or place where deer are uſually kept, or in any warren for hares or conies, or in any high
[144] road, open heath, common, or down, by day or night, with faces blacked or otherwiſe *diſguiſed*, or (being ſo diſguiſed) to hunt, wound, kill, or ſteal any deer, to rob a warren, or to ſteal fiſh, or to procure by gift or promiſe of reward any perſon to join them in ſuch unlawful act, is felony without benefit of clergy. I mention theſe offences in this place, not on account of the damage thereby done to private property, but of the manner in which that damage is committed: namely, with the face blacked or with other diſguiſe, and, being armed with offenſive weapons, to the breach of the public peace and the terror of his majeſty's ſubjects.

3. Also by the ſame ſtatute 9 Geo. I. c. 22. amended by ſtatute 27 Geo. II. c. 15. knowingly to ſend any *letter* without a name, or with a fictitious name, *demanding* money, veniſon, or any other valuable thing, or *threatening* (without any demand) to kill any of the king's ſubjects, or to fire their houſes, out-houſes, barns, or ricks, is made felony without benefit of clergy (2). This offence was formerly high treaſon by the ſtatute 8 Hen. V. c. 6.

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(1) And in another clauſe of the ſame act, perſons injured by any buildings being demoliſhed by a riotous aſſembly, may recover damages in an action againſt the hundred. And it was determined after the riots in 1780, that the owners of houſes might recover damages alſo for the deſtruction of furniture, or for any injury to their property done at the ſame time that the buildings were demoliſhed, or were in part pulled down. *Doug.* 673.

(2) The words of theſe ſtatutes are, *ſhall knowingly ſend*, and therefore it has been determined if the writer of a threatening letter delivers it himſelf, he is not guilty of felony. *Leach.* 351.

4. To

4. To pull down or deſtroy any *lock*, *ſluice*, or *floodgate*, erected by authority of parliament on a navigable river, is by ſtatute 1 Geo. II. ſt. 2. c. 19. made felony, puniſhable with tranſportation for ſeven years (3). By the ſtatute 8 Geo. II. c. 20. the offence of deſtroying ſuch works, or reſcuing any perſon in cuſtody for the ſame, is made felony without benefit of clergy; and it may be inquired of and tried in any adjacent county, as if the fact had been therein committed. By the ſtatute 4 Geo. III. c. 12. maliciouſly to damage or deſtroy any banks, ſluices, or other works on ſuch navigable river, to open the floodgates, or otherwiſe obſtruct the navigation, is again made felony, puniſhable with tranſportation for ſeven years. And by the ſtatute 7 Geo. III. c. 40. (which repeals all former acts relating to turnpikes) maliciouſly to pull down or otherwiſe deſtroy any *turnpike gate*, or fence, toll-houſe, or weighing-engine thereunto belonging, erected by authority of parliament, or to reſcue any perſon [145] in cuſtody for the ſame, is made felony without benefit of clergy; and the indictment may be inquired of and tried in any adjacent county (4). The remaining offences againſt the public peace are merely miſdemeſnors, and no felonies; as,

5. AFFRAYS (from *affraier*, to terrify) are the fighting of two or more perſons in ſome public place, to the terror of his majeſty's ſubjects: for, if the fighting be in private, it is

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(3) This ſtatute of 1 Geo. II. ſt. 2. c. 19. after ſeveral continuances, was ſuffered to expire in 1748.

(4) The ſtatute of 7 Geo. III. c. 40. is repealed by the 13 Geo. III. c. 84. by which the offence deſcribed in the former ſtatute is made felony, puniſhable at the diſcretion of the court by tranſportation for ſeven years, or impriſonment for any time not exceeding three years.

And this is extended by the 21 Geo. III. c. 20. to all acts ſubſequent to the 13 Geo. III. which had been, or ſhould in future be, paſſed for amending and repairing any particular turnpike road in England.

no *affray* but an *aſſault*[b]. Affrays may be ſuppreſſed by any private perſon preſent, who is juſtifiable in endeavouring to part the combatants, whatever conſequence may enſue[c]. But more eſpecially the conſtable, or other ſimilar officer, however denominated, is bound to keep the peace; and to that purpoſe may break open doors to ſuppreſs an affray, or apprehend the affrayers; and may either carry them before a juſtice, or impriſon them by his own authority for a convenient ſpace till the heat is over; and may then perhaps alſo make them find ſureties for the peace[d]. The puniſhment of common affrays is by fine and impriſonment; the meaſure of which muſt be regulated by the circumſtances of the caſe: for, where there is any material aggravation, the puniſhment proportionably increaſes. As where two perſons coolly and deliberately engage in a duel; this being attended with an apparent intention and danger of murder, and being a high contempt of the juſtice of the nation, is a ſtrong aggravation of the affray, though no miſchief has actually enſued[e]. Another aggravation is, when thereby the officers of juſtice are diſturbed in the due execution of their office: or where a reſpect to the particular place ought to reſtrain and regulate men's behaviour, more than in common ones; as in the
[146] king's court, and the like. And upon the ſame account alſo all affrays in a church or church-yard are eſteemed very heinous offences, as being indignities to him to whoſe ſervice thoſe places are conſecrated. Therefore mere quarrelſome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by ſtatute 5 & 6 Edw. VI. c. 4. that if any perſon ſhall, by words only, quarrel, chide, or brawl, in a church or church-yard, the ordinary ſhall ſuſpend him, if a layman, *ab ingreſſu eccleſiae*; and, if a clerk in orders, from the miniſtration of his office during pleaſure. And, if any perſon in ſuch church or church-yard proceeds to ſmite or lay violent hands upon another, he ſhall be excommunicated *ipſo facto*; or if he ſtrikes him with a weapon, or draws any weapon with intent to

[b] 1 Hawk. P. C. 134.
[c] *Ibid.* 136.
[d] 1 Hawk. P. C. 137.
[e] *Ibid.* 138.

ſtrike, he ſhall beſides excommunication (being convicted by a jury) have one of his ears cut off: or, having no ears, be branded with the letter F in his cheek. *Two* perſons may be guilty of an affray: but,

6. RIOTS, *routs*, and *unlawful aſſemblies*, muſt have *three* perſons at leaſt to conſtitute them. An *unlawful aſſembly* is when three, or more, do aſſemble themſelves together to do an unlawful act, as to pull down incloſures, to deſtroy a warren or the game therein; and part without doing it, or making any motion towards it [f]. A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way: and make ſome advances towards it [g]. A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cauſe or quarrel [h]: as if they beat a man; or hunt and kill game in another's park, chaſe, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuſance, in a violent and tumultuous manner. The puniſhment of unlawful aſſemblies, if to the number of twelve, we have juſt now ſeen, may be capital, according [147] to the circumſtances that attend it; but, from the number of three to eleven, is by fine and impriſonment only. The ſame is the caſe in riots and routs by the common law; to which the pillory in very enormous caſes has been ſometimes ſuperadded [i]. And by the ſtatute 13 Hen. IV. c. 7. any two juſtices, together with the ſheriff or under-ſheriff of the county, may come with the *poſſe comitatus*, if need be, and ſuppreſs any ſuch riot, aſſembly, or rout, arreſt the rioters, and record upon the ſpot the nature and circumſtances of the whole tranſaction; which record alone ſhall be a ſufficient conviction of the offenders. In the interpretation of which ſtatute it hath been holden, that all perſons, noblemen and others, except women, clergymen, perſons decrepit, and in-

[f] 3 Inſt. 176.
[g] Bro. *Abr. t. Riot.* 4. 5.
[h] 3 Inſt. 176.
[i] 1 Hawk. P. C. 159.

fants

fants under fifteen, are bound to attend the juſtices in ſuppreſſing a riot, upon pain of fine and impriſonment; and that any battery, wounding, or killing the rioters, that may happen in ſuppreſſing the riot, is juſtifiable [j]. So that our antient law, previous to the modern riot act, ſeems pretty well to have guarded againſt any violent breach of the public peace; eſpecially as any riotous aſſembly on a public or general account, as to redreſs grievances or pull down all incloſures, and alſo reſiſting the king's forces if ſent to keep the peace, may amount to overt acts of high treaſon, by levying war againſt the king.

7. NEARLY related to this head of riots is the offence of *tumultuous petitioning*; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by ſtatute 13 Car. II. ſt. 1. c. 5. it is enacted, that not more than twenty names ſhall be ſigned to any petition to the king or either houſe of parliament, for any alteration of matters eſtabliſhed by law in church or ſtate; unleſs the contents thereof be previouſly approved, in the country, by three juſtices, or the majority of the grand jury at the aſſiſes or quarter-ſeſſions; and, in London, by the lord mayor, aldermen, and common council [k]: and that no petition ſhall
[148] be delivered by a company of more than ten perſons; on pain in either caſe of incurring a penalty not exceeding 100*l.* and three months impriſonment.

8. AN eighth offence againſt the public peace is that of a *forcible entry* or *detainer*; which is committed by violently taking or keeping poſſeſſion of lands and tenements, with menaces, force, and arms, and without the authority of law. This was formerly allowable to every perſon diſſeiſed, or turned out of poſſeſſion, unleſs his entry was taken away or barred by his own neglect, or other circumſtances; which were explained more at large in a former volume [l]. But this

[j] 1 Hal. P. C. 495. 1 Hal. P. C. 161.

[k] This may be one reaſon (among others) why the corporation of London has, ſince the reſtoration, uſually taken the lead in petitions to parliament for the alteration of any eſtabliſhed law.

[l] See Vol. III. pag. 174, &c.

being

being found very prejudicial to the public peace, it was thought neceſſary by ſeveral ſtatutes to reſtrain all perſons from the uſe of ſuch violent methods, even of doing themſelves juſtice; and much more if they have no juſtice in their claim[m]. So that the entry now allowed by law is a peaceable one; that forbidden is ſuch as is carried on and maintained with force, with violence, and unuſual weapons. By the ſtatute 5 Ric. II. ſt. 1. c. 8. all forcible entries are puniſhed with impriſonment and ranſom at the king's will. And by the ſeveral ſtatutes of 15 Ric. II. c. 2. 8 Hen. VI. c. 9. 31 Eliz. c. 11. and 21 Jac. I. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more juſtices of the peace, taking ſufficient power of the county, may go to the place, and there record the force upon his own view, as in caſe of riots; and upon ſuch conviction may commit the offender to gaol, till he makes fine and ranſom to the king. And moreover the juſtice or juſtices have power to ſummon a jury, to try the forcible entry or detainer complained of: and, if the ſame be found by that jury, then, beſides the fine on the offender, the juſtices ſhall make reſtitution by the ſheriff of the poſſeſſion, without inquiring into the merits of the title; for the force is the only thing to be tried, puniſhed, and remedied by them: and the ſame may be done by indictment at the general ſeſſions. But this proviſion does not extend to ſuch as endeavour to maintain poſſeſſion by force, where they themſelves, or their anceſtors, have been in the peaceable enjoy- [149]
ment of the lands and tenements, for three years immediately preceding[n].

9. THE offence of *riding* or *going armed*, with dangerous or unuſual weapons, is a crime againſt the public peace, by terrifying the good people of the land; and is particularly prohibited by the ſtatute of Northampton, 2 Edw. III. c. 3. upon pain of forfeiture of the arms, and impriſonment during the

[m] 1 Hawk. P. C. 141.

[n] Holding over by force, where the tenant's title was under a leaſe, now expired, is ſaid to be a forcible detainer. (Cro. Jac. 199.)

king's

king's pleasure: in like manner, as by the laws of Solon, every Athenian was finable who walked about the city in armour[o].

10. SPREADING *false news*, to make discord between the king and nobility, or concerning any great man of the realm, is punishable by common law[p] with fine and imprisonment; which is confirmed by statutes Westm. 1. 3 Edw. I. c. 34. 2 Ric. II. st. 1. c. 5. and 12 Ric. II. c. 11.

11. FALSE and *pretended prophecies*, with intent to disturb the peace, are equally unlawful, and more penal; as they raise enthusiastic jealousies in the people, and terrify them with imaginary fears. They are therefore punished by our law, upon the same principle that spreading of public news of any kind, without communicating it first to the magistrate, was prohibited by the antient Gauls[q]. Such false and pretended prophecies were punished capitally by statute 1 Edw. VI. c. 12. which was repealed in the reign of queen Mary. And now by the statute 5 Eliz. c. 15. the penalty for the first offence is a fine of ten pounds and one year's imprisonment; for the second, forfeiture of all goods and chattels, and imprisonment during life.

[150] 12. BESIDES actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the same denomination. Therefore *challenges to fight*, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offence[r]. If this challenge arises on account of any money won at gaming, or if any assault or affray happen upon such account, the offender, by statute 9 Anne c. 14. shall forfeit all his goods to the crown, and suffer two years imprisonment.

[o] Pott. Antiq. b. 1. c. 26.

[p] 2 Inst. 226. 3 Inst. 198.

[q] "*Habent legibus sanctum, si quis "quid de republica a finitimis rumore aut "fama acceperit, uti ad magistratum de- "ferat, neve cum alio communicet: quod "saepe homines temerarios atque imperitos "falsis rumoribus terreri, et ad facinus "impelli, et de summis rebus consilium "capere cognitum est.*" Cæs. de bell. Gall. lib. 6. cap. 19.

[r] 1 Hawk. P. C. 135. 138.

13. OF

13. Of a nature very similar to challenges are *libels*, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule[s]. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law[f]: and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace[t]. For the same reason it is immaterial with respect to the offence of a libel, whether the matter of it be true or false[u]; since the provocation, and not the falsity, is the thing to be punished criminally: though, doubtless, the falsehood of it may aggravate it's guilt, and enhance it's punishment (5). In a civil action, we may remember, a libel must appear to be false, as well as scandalous[w]; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace: and [151] therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animo-

[s] 1 Hawk. P. C. 193.
[f] Moor. 813.
[t] 2 Brown. 151. 12 Rep. 35. Hob. 215. Poph. 139. 1 Hawk. P. C. 195.
[u] Moor. 627. 5 Rep. 125. 11 Mod. 99.
[w] See Vol. III. pag. 125.

(5) Where truth is a greater provocation than falsehood, and therefore has a greater tendency to produce a breach of the public peace, then it is certainly true that the greater truth, the greater libel. *Asperis facetiis inlusus, quæ ubi multum ex vero traxere, acrem sui memoriam relinquunt.* TAC. Ann. 15. c. 68.

ſities, and to diſturb the public peace, is the whole that the law conſiders. And therefore, in ſuch proſecutions, the only points to be enquired into are, firſt, the making or publiſhing of the book or writing; and, ſecondly, whether the matter be criminal: and, if both theſe points are againſt the defendant, the offence againſt the public is complete. The puniſhmant of ſuch libellers, for either making, repeating, printing, or publiſhing the libel, is fine, and ſuch corporal puniſhment as the court in it's diſcretion ſhall inflict; regarding the quantity of the offence, and the quality of the offender[x] (6). By the law of the twelve tables at Rome,

[x] 1 Hawk. P. C. 196.

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(6) Though it has been held, at leaſt for theſe two centuries, that the truth of a libel is no juſtification in a criminal proſecution, yet in many inſtances it is conſidered an extenuation of the offence; and the court of King's Bench has laid down this general rule, *viz.* that it will not grant an information for a libel, unleſs the proſecutor, who applies for it, makes an affidavit, aſſerting directly and pointedly, that he is innocent of the charge imputed to him. But this rule may be diſpenſed with, if the perſon libelled reſides abroad, or if the imputations of the libel are general and indefinite, or if it is a charge againſt the proſecutor for language which he has held in parliament. *Doug.* 271. 372.

It had frequently been determined by the court of King's Bench, that the only queſtions for the conſideration of the jury, in criminal proſecutions for libels, were the fact of publication, and the truth of the innuendos, that is, the truth of the meaning and ſenſe of the paſſages of the libel, as ſtated and averred in the record, and that the judge or court alone were competent to determine whether the ſubject of the publication was or was not a libel. See the caſe of the Dean of St. Aſaph, 3 *T. R.* 428. But the legality of this doctrine having been much controverted, the 32 Geo. III. c. 60. was paſſed, intituled *An act to remove doubts reſpecting the functions of juries in caſes of libels.* And it declares and enacts, that on every trial of an indictment or information for a libel, the jury may give a general verdict of guilty, or not guilty, upon the whole matter in iſſue, and ſhall not be required or directed by the judge to find the defendant guilty, merely on the proof of the publica-

tion

libels, which affected the reputation of another, were made a capital offence: but, before the reign of Auguſtus, the puniſhment became corporal only [y]. Under the emperor Valentinian [z] it was again made capital, not only to write, but

[y] ——*Quinetiam lex*
Poenaque lata, malo quae nollet carmine quenquam
Deſcribi:——*vertere modum formidine* fuſtis. HOR. *ad Aug.* 152.
[z] *Cod.* 9. 36.

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tion of the paper charged to be a libel, and of the ſenſe aſcribed to it in the record. But the ſtatute provides, that the judge may give his opinion to the jury reſpecting the matter in iſſue, and the jury may at their diſcretion, as in other caſes, find a ſpecial verdict, and the defendant, if convicted, may move the court, as before the ſtatute, in arreſt of judgment. A perſon may be puniſhed for a libel reflecting on the memory and character of the dead, but it muſt be alleged, and proved to the ſatisfaction of the jury, that the author intended by the publication to bring diſhonour and contempt on the relations and deſcendants of the deceaſed. 4 *T. R.* 126.

It is not a libel to publiſh a correct copy of the reports or reſolutions of the two houſes of parliament, or a true account of the proceedings of a court of juſtice. "For though (as Mr. "Juſtice Lawrence has well obſerved) the publication of ſuch "proceedings may be to the diſadvantage of the particular indi-"vidual concerned, yet it is of vaſt importance to the public that "the proceedings of courts of juſtice ſhould be univerſally known. "The general advantage to the country in having theſe proceed-"ings made public, more than counterbalances the inconveniencies "to the private perſons, whoſe conduct may be the ſubject of "ſuch proceedings." *R.* v. *Wright.* 8 *T. R.* 293.

But this will not apply to the publication of part of a trial, before it is finally concluded; for that might enable the friends of parties to pervert the juſtice of the court by the fabrication of evidence, and other impure practices.

Nor ought it to extend to the publication of trials, where indecent evidence muſt from neceſſity be introduced; for it would be in vain to turn women and children out of court, if they are afterwards permitted to read what has paſſed in their abſence.

to publiſh, or even to omit deſtroying them. Our law, in this and many other reſpects, correſponds rather with the middle age of Roman juriſprudence, when liberty, learning, and humanity, were in their full vigour, than with the cruel edicts that were eſtabliſhed in the dark and tyrannical ages of the ancient *decemviri*, or the later emperors.

IN this and the other inſtances which we have lately conſidered, where blaſphemous, immoral, treaſonable, ſchiſmatical, ſeditious, or ſcandalous libels are puniſhed by the Engliſh law, ſome with a greater, others with a leſs degree of ſeverity; the *liberty of the preſs*, properly underſtood, is by no means infringed or violated. The liberty of the preſs is indeed eſſential to the nature of a free ſtate; but this conſiſts in laying no *previous* reſtraints upon publications, and not in freedom from cenſure for criminal matter when pub-
[152] liſhed. Every freeman has an undoubted right to lay what ſentiments he pleaſes before the public: to forbid this, is to deſtroy the freedom of the preſs: but if he publiſhes what is improper, miſchievous, or illegal, he muſt take the conſequence of his own temerity. To ſubject the preſs to the

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The ſale of the libel by a ſervant in a ſhop, is *prima facie* evidence of publication in a proſecution againſt the maſter, and is ſufficient for conviction, unleſs contradicted by contrary evidence, ſhewing that he was not privy, nor in any degree aſſenting to it. *Ibid.* and 5 *Burr.* 2686. When a perſon is brought to receive judgment for a libel, his conduct, ſubſequent to his conviction, may be taken into conſideration, either by way of aggravation or mitigation of the puniſhment. 3 *T. R.* 432. And when Johnſon the bookſeller was brought up for judgment for having publiſhed a ſeditious libel, the Attorney-General produced an affidavit that the defendant after his conviction had publiſhed the ſame libel in the Analytical Review. *M. T.* 1798.

An information or an indictment need not ſtate that the libel is falſe, or that the offence was committed by force and arms. 7 *T. R.* 4.

reſtrictive power of a licenſer, as was formerly done, both before and ſince the revolution[a], is to ſubject all freedom of ſentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to puniſh (as the law does at preſent) any dangerous or offenſive writings, which, when publiſhed, ſhall on a fair and impartial trial be adjudged of a pernicious tendency, is neceſſary for the preſervation of peace and good order, of government and religion, the only ſolid foundations of civil liberty. Thus the will of individuals is ſtill left free; the abuſe only of that free will is the object of legal puniſhment. Neither is any reſtraint hereby laid upon freedom of thought or inquiry: liberty of private ſentiment is ſtill left; the diſſeminating, or making public, of bad ſentiments, deſtructive of the ends of ſociety, is the crime which ſociety [153] corrects. A man (ſays a fine writer on this ſubject) may be allowed to keep poiſons in his cloſet, but not publicly to vend them as cordials. And to this we may add, that the only plauſible argument heretofore uſed for the reſtraining the juſt freedom of the preſs, "that it was ne-

[a] The art of printing, ſoon after it's introduction, was looked upon (as well in England as in other countries) as merely a matter of ſtate, and ſubject to the coërcion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of ſtarchamber; which limited the number of printers, and of preſſes which each ſhould employ, and prohibited new publications, unleſs previouſly approved by proper licenſers. On the demolition of this odious juriſdiction in 1641, the long parliament of Charles I. after their rupture with that prince, aſſumed the ſame powers as the ſtarchamber exerciſed with reſpect to the licenſing of books: and in 1643, 1647, 1749, and 1652, (Scobell. i. 44. 134. ii. 88. 230.) iſſued their ordinances for that purpoſe, founded principally on the ſtarchamber decree of 1637. In 1662 was paſſed the ſtatute 13 & 14 Car. II. c. 33. which (with ſome few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by ſtatute 1 Jac. II. c. 17. and continued till 1692. It was then continued for two years longer by ſtatute 4 W. & M. c. 24. but though frequent attempts were made by the government to revive it, in the ſubſequent part of that reign (Com. Journ. 11 Feb. 1694. 26 Nov. 1695. 22 Oct. 1696. 9 Feb. 1697. 31 Jan. 1698.), yet the parliament reſiſted it ſo ſtrongly, that it finally expired, and the preſs became properly free, in 1694; and has ever ſince ſo continued.

" ceſſary to prevent the daily abuſe of it," will entirely loſe it's force, when it is ſhewn (by a ſeaſonable exertion of the laws) that the preſs cannot be abuſed to any bad purpoſe, without incurring a ſuitable puniſhment: whereas it never can be uſed to any good one, when under the controul of an inſpector. So true will it be found, that to cenſure the licentiouſneſs, is to maintain the liberty of the preſs (7).

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(7) To this chapter it will be proper to annex the ſubſtance of an important act of parliament paſſed to ſecure the public peace, viz. the 39th Geo. III. c. 79. the preamble of which ſtates: " Whereas a traitorous conſpiracy has long been carried " on, in conjunction with the perſons from time to time exer- " ciſing the powers of government in France, to overturn the " laws, conſtitution, and government, and every exiſting eſta- " bliſhment, civil and eccleſiaſtical, both in Great Britain and " Ireland, and to diſſolve the connection between the two king- " doms, ſo neceſſary to the ſecurity and proſperity of both: " And whereas, in purſuance of ſuch deſign, and in order to " carry the ſame into effect, divers ſocieties have been of late " years inſtituted in this kingdom and in the kingdom of Ire- " land, of a new and dangerous nature, inconſiſtent with public " tranquillity and with the exiſtence of regular government, par- " ticularly certain ſocieties calling themſelves Societies of United " Engliſhmen, United Scotchmen, United Britons, United Iriſh- " men, and the London Correſponding Society: And whereas " the members of many of ſuch ſocieties have taken unlawful " oaths and engagements of fidelity and ſecrecy, and uſed ſecret " ſigns, and appointed committees, ſecretaries, and other officers, " in a ſecret manner; and many of ſuch ſocieties are compoſed " of different diviſions, branches, or parts, which communicate " with each other by ſecretaries, delegates, or otherwiſe, and by " means thereof maintain an influence over large bodies of men, " and delude many ignorant and unwary perſons into the com- " miſſion of acts highly criminal;" it therefore enacts that all theſe and other correſponding ſocieties ſhould be utterly ſup- preſſed and prohibited, as being unlawful combinations and con- federacies.

And

And alſo every ſociety of which the members ſhall, according to the rules of the ſociety, be required to take an illegal oath or an oath not authoriſed by law, or ſhall ſubſcribe or aſſent to any teſt or declaration not required by law, or where the names of the members, or where the committees or preſidents choſen, are not known to the ſociety at large; and every ſociety, which ſhall conſiſt of different parts either acting ſeparately or having ſeparate preſidents or other officers, ſhall be deemed unlawful combinations and confederacies; and every perſon who ſhall become a member of ſuch a ſociety, or who ſhall correſpond with them, or ſhall aid or ſupport them with money or otherwiſe, ſhall be guilty of an unlawful combination and confederacy.

This does not extend to a declaration ſubſcribed to by a ſociety, which declaration ſhall be approved by two juſtices and afterwards confirmed at the quarter ſeſſions, nor to perſons who ſhall ceaſe to act as members of ſuch ſocieties after the paſſing of the act, nor to eſtabliſhed lodges of free maſons. But two members ſhall certify, and upon oath, that their ſociety has been uſually held as a lodge of free maſons, in conformity to the rules of free maſons in this kingdom; which certificate, and alſo an account of its place and times of meeting, and the names of all its members, ſhall be regiſtered with the clerk of the peace; and the juſtices at the ſeſſions, upon complaint made to them upon oath by any credible perſon that ſuch ſociety is likely to be injurious to the public peace and good order, may direct that the meetings of ſuch lodge be diſcontinued.

Perſons offending againſt this ſtatute may be proceeded againſt either in a ſummary way before one juſtice, or more, who may either fine the offender 20*l.* or impriſon him three calendar months, or they may be proſecuted by indictment; and upon conviction the court may tranſport for ſeven years, or impriſon for any time not exceeding two years.

The juſtices in a ſummary conviction may mitigate the puniſhment to one third. If any perſon ſhall permit the meeting of any illegal ſociety in his houſe, he ſhall forfeit 5*l.* for the firſt offence, and for the ſecond he ſhall be puniſhable as a member. And two juſtices, upon evidence on oath that any meeting has been held for a ſeditious purpoſe in a public houſe, may declare the licence forfeited, and from the day of ſuch declaration the licence is void and determined, and the owner of the houſe will be afterwards ſubject to penalties accordingly.

And because many places were open for lectures and debates of a seditious and immoral nature, and other places used for seditious and immoral purposes under pretence of reading books, pamphlets, newspapers, or other publications, it is enacted, that, all such places where, under any pretence, money shall be received for admission, shall be considered as disorderly houses, under the 36 Geo. III. c. 8. (see *ante*, *p.* 88. n. 9.) unless they are licensed for any time not more than one year by two justices; which licence may be revoked by the justices at the quarter sessions. Every alehouse shall be deemed licensed for reading publications; but upon evidence that publications of a seditious or immoral nature are usually distributed in order to be read there, two justices may declare the licence void.

The act then states that these societies had published in great quantities, papers of an irreligious, treasonable, and seditious nature, and had dispersed them among the lower classes of the community, either gratis or at very low prices, and with an activity and profusion beyond all former example, and that it was highly important to the public peace that it should in future be known by whom any such papers shall be printed; it therefore enacts, that every person having any printing press, or types for printing, and every person carrying on the business of a letter founder, or maker or seller of types for printing, or of printing presses, shall give notice thereof to the clerk of the peace, who shall transmit a copy to one of his majesty's principal secretaries of state; persons omitting to give the notice required shall forfeit 20*l.*

And every person who shall sell types or printing presses shall keep an account of all persons to whom they shall be sold, and shall produce such an account at any time to any justice of the peace requiring the same, on penalty of 20*l.*

The printer shall print upon the front of every paper, which is printed on one side only, and upon the first and last leaves of every publication which contains more than one leaf, his name and place of abode, and in case of omission shall forfeit for every copy published 20*l.*; and every person, who prints for profit, shall keep one copy of every paper so printed, on which shall be written or printed the name and place of abode of the person, by whom such printer shall be employed, and shall produce the same to any justice of the peace who within the space of six months shall require to see the same, and upon neglect or refusal shall forfeit 20*l.*

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Any perſon may apprehend thoſe who are publiſhing papers without the name and abode of the printer, and may convey them, or deliver them to a conſtable to convey, to a magiſtrate to be examined; and a peace officer, by a warrant from a juſtice of the peace, may enter any houſe or room to ſearch for any printing preſs or types ſuſpected to be kept or uſed without the notice required by the act, and to ſeize and carry them away, together with all printed papers found in ſuch houſe or room.

By the 38 Geo. III. c. 78. the editors of newſpapers are put under various regulations, by which they may be more eaſily brought to puniſhment for any ſeditious or miſchievous publication.

CHAPTER THE TWELFTH.

OF OFFENCES AGAINST PUBLIC TRADE.

OFFENCES againſt public *trade*, like thoſe of the preceding claſſes, are either felonious, or not felonious. Of the firſt ſort are,

1. OWLING, ſo called from it's being uſually carried on in the night, which is the offence of tranſporting wool or ſheep out of this kingdom, to the detriment of it's ſtaple manufacture. This was forbidden at common law [a], and more particularly by ſtatute 11 Edw. III. c. 1. when the importance of our woollen manufacture was firſt attended to; and there are now many later ſtatutes relating to this offence, the moſt uſeful and principal of which are thoſe enacted in the reign of queen Elizabeth, and ſince. The ſtatute 8 Eliz. c. 3. makes the tranſportation of live ſheep, or embarking them on board any ſhip, for the firſt offence forfeiture of goods, and impriſonment for a year, and that at the end of the year the left hand ſhall be cut off in ſome public market, and ſhall be there nailed up in the openeſt place; and the ſecond offence is felony. The ſtatutes 12 Car. II. c. 32. and 7 & 8 W. III. c. 28. make the exportation of wool, ſheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of the intereſt of the ſhip and cargo by the owners, if privy; and confiſcation of goods, and three years impriſonment to the maſter and all the mariners. And the ſtatute 4 Geo. I. c. 11. (amended and farther enforced by 12 Geo. II.

[a] Mir. c. 1. § 3.

c. 21.

c. 21. and 19 Geo. II. c. 34.) makes it tranſportation for ſeven years, if the penalties be not paid (1).

2. SMUGGLING, or the offence of importing goods without paying the duties impoſed thereon by the laws of the cuſtoms and exciſe, is an offence generally connected and carried on hand in hand with the former. This is reſtrained by a great variety of ſtatutes, which inflict pecuniary penalties and ſeiſure of the goods for clandeſtine ſmuggling; and affix the guilt of felony, with tranſportation for ſeven years, upon [155]

(1) By the 28 Geo. III. c. 38. all the former ſtatutes reſpecting the exportation of ſheep and wool are repealed, and an infinite variety of regulations and reſtrictions upon the ſubject is conſolidated in that ſtatute, which it behoves the dealers in, and carriers of, wool to pay particular attention to. It is given almoſt at length in the 4th vol. of *Burn*, tit. Woollen Manufacture, c. II. but as it contains near one hundred long clauſes, it is impoſſible to give any adequate repreſentation of it in an abridgment. The principal prohibitions are, that if any perſon ſhall ſend or receive any ſheep on board a ſhip or veſſel, to be carried out of the kingdom, the ſheep and veſſel are both forfeited, and the perſon ſo offending ſhall forfeit 3*l.* for every ſheep, and ſhall ſuffer ſolitary impriſonment for three months. But wether ſheep, by a licence from the collector of the cuſtoms, may be taken on board for the uſe of the ſhip's company. And every perſon, who ſhall export out of the kingdom, any wool, or woollen articles ſlightly made up, ſo as eaſily to be reduced to wool again, or any fuller's earth, or tobacco-pipe clay, and every carrier, ſhip-owner, commander, mariner, or other perſon, who ſhall knowingly aſſiſt in exporting, or in attempting to export, theſe articles, ſhall forfeit 3*s.* for every pound weight, or the ſum of 50*l.* in the whole, at the election of the proſecutor, and ſhall alſo ſuffer ſolitary impriſonment for three months. But wool may be carried coaſtwiſe upon being duly entered, and ſecurity being given, according to the directions of the ſtatute, to the officer of the port from whence the ſame ſhall be conveyed. And the owners of ſheep, which are ſhorn within five miles of the ſea, or within ten miles in Kent and Suſſex, cannot remove the wool without giving notice to the officer of the neareſt port, as directed by the ſtatute.

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more open, daring, and avowed practices: but the laſt of them, 19 Geo. II. c. 34. is for this purpoſe *inſtar omnium;* for it makes all forcible acts of ſmuggling, carried on in defiance of the laws, or even in diſguiſe to evade them, felony without benefit of clergy: enacting, that if three or more perſons ſhall aſſemble, with fire-arms or other offenſive weapons, to aſſiſt in the illegal exportation or importation of goods, or in reſcuing the ſame after ſeiſure, or in reſcuing offenders in cuſtody for ſuch offences; or ſhall paſs with ſuch goods in diſguiſe; or ſhall wound, ſhoot at, or aſſault any officers of the revenue when in the execution of their duty; ſuch perſons ſhall be felons without the benefit of clergy. As to that branch of the ſtatute, which required any perſon, charged upon oath as a ſmuggler, under pain of death, to ſurrender himſelf upon proclamation, it ſeems to be expired; as the ſubſequent ſtatutes [b], which continue the original act to the preſent time, do in terms continue only ſo much of the ſaid act as relates to the *puniſhment* of the offenders, and not to the extraordinary method of apprehending or cauſing them to ſurrender; and for offences of this poſitive ſpecies, where puniſhment (though neceſſary) is rendered ſo by the laws themſelves, which by impoſing high duties on commodities increaſe the temptation to evade them, we cannot ſurely be too cautious in inflicting the penalty of death [c] (2).

[b] Stat. 26 Geo. I. c. 32. 32 Geo. II. c. 18. 4 Geo. III. c. 12.

[c] See Vol. I. p. 317. Beccar. c. 33.

(2) But the 19 Geo. III. c. 69. ſec. 23. has expreſsly declared that the *method of apprehending* the offenders deſcribed in the 19 Geo. II. c. 34. and of *cauſing them to ſurrender*, is continued by all the ſtatutes, which have continued the 19 Geo. II. c. 34. and it is alſo recited at length in the 24 Geo. III. ſeſſ. 2. c. 47. and is there directed to be enforced for procuring the apprehending of the capital felons deſcribed by that ſtatute, who are perſons who ſhall maliciouſly ſhoot into any ſhip or boat, or at any cuſtom-houſe officer or his aſſiſtant, in the execution of his duty, either on ſhore or within four leagues of it.

It is equivalent to an attainder by outlawry, and is thus deſcribed. When any perſon ſhall be charged with any the ſaid offences,

3. ANOTHER offence againſt public trade is fraudulent *bankruptcy*, which was ſufficiently ſpoken of in a former volume [d]; I ſhall therefore here barely mention the ſeveral ſpecies of fraud, taken notice of by the ſtatute law; *viz.* the bankrupt's neglect of ſurrendering himſelf to his creditors; his non-conformity to the directions of the ſeveral ſtatutes; his concealing or embezzling his effects to the value of 20*l.*: and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made felony without benefit of clergy [e]. And indeed it is allowed by ſuch as are the moſt averſe to the infliction of capital puniſhment, that the offence of fraudulent bankruptcy, being an atrocious ſpecies of the *crimen falſi*, ought to be put upon a level with thoſe of forgery and falſifying the coin [f]. And, even without actual fraud, if the bankrupt can-

[d] See Vol. II. pag. 481, 482.
[e] Stat. 5 Geo. II. c. 30.
[f] Beccar. ch. 34.

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fences, before a juſtice of the peace, by information on oath, the juſtice ſhall certify the ſame under his hand and ſeal, and return the information to a ſecretary of ſtate, who ſhall lay the ſame before the king in council; who may thereon make his order, commanding the offender to ſurrender in forty days after the firſt publication thereof in the gazette, to one of the judges of the king's bench or a juſtice of the peace, who thereon ſhall commit him to gaol, to anſwer the charge againſt him according to due courſe of law: which order the clerks of the privy council ſhall cauſe to be forthwith publiſhed in the two ſucceſſive gazettes, and to be tranſmitted to the ſheriff where the offence was committed; who ſhall in fourteen days cauſe the ſame to be proclaimed between ten in the morning and two in the afternoon, in the market places, on the market days, of two market towns in the ſame county, near the place where the offence was committed; and a copy of the order ſhall be affixed on ſome public place in the ſaid towns: and if ſuch offender ſhall not ſurrender purſuant to ſuch order, or eſcape after ſurrender, he ſhall be attainted of felony without benefit of clergy. See an inſtance in *Foſt.* 51. where the attorney-general prayed the judgment of the court of king's bench under this ſtatute; but the priſoner was diſcharged becauſe the directions of the ſtatute had not been duly obſerved.

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not make it appear that he is disabled from paying his debts by some casual loss, he shall by the statute 21 Jac. I. c. 19. be set on the pillory for two hours, with one of his ears nailed to the same, and cut off. To this head we may also subjoin, that by statute 32 Geo. II. c. 28. it is felony punishable by transportation for seven years, if a prisoner, charged in execution for any debt under 100*l.* neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors (3). And these are the only felonious offences against public trade; the residue being mere misdemesnors: as,

4. USURY, which is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase. Of this also we had occasion to discourse at large in a former volume [s]. We there observed that by statute 37 Hen. VIII. c. 9. the rate of interest was fixed at 10*l. per cent. per annum*, which the statute 13 Eliz. c. 8. confirms; and ordains, that all brokers shall be guilty of a *praemunire* that transact any contracts for more, and the securities themselves shall be
[157] void. The statute 21 Jac. I. c. 17. reduced interest to eight *per cent.*; and, it having been lowered in 1650, during the usurpation, to six *per cent.* the same reduction was re-enacted after the restoration by statute 12 Car. II. c. 13. and lastly, the statute 12 Ann. st. 2. c. 16. has reduced it to five *per cent.* Wherefore not only all contracts for taking more are in themselves totally void, but also the lender shall forfeit treble the money borrowed (4). Also if any

[s] See Vol. II. pag. 455, &c.

(3) By the 33 Geo. III. c. 5. the debt is enlarged to 300*l.*

(4) One half of the penalty is given by the statute to the prosecutor, the other half to the king.—It is remarkable, that such was the prejudice in antient times against lending money upon interest, that the first statute, the 37 Hen. VIII. c. 9. by which it was legalized, was afterwards repealed by 5 & 6 Edw. VI. c. 20. by which all interest was prohibited, the money lent and the interest were forfeited, and the offender was subject to fine and imprisonment.

ſcrivener or broker takes more than five ſhillings *per cent.* procuration-money, or more than twelve-pence for making

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priſonment.—A learned author has diſplayed much ingenuity in arguing againſt the policy of the limits of intereſt upon a contract for the loan of money, but Cato was of a different opinion. *Cum ille, qui quæſierat, dixiſſet, Quid fœnerari? Tum Cato, Quid hominem, inquit, occidere?* CIC. Off.

It is not neceſſary, that money ſhould be actually advanced to conſtitute the offence of uſury, but any contrivance or pretence whatever to gain more than legal intereſt, where it is the intent of the parties to contract for a loan, will be uſury; as where a perſon applies to a tradeſman to lend him money, who, inſtead of caſh, furniſhes him with goods, to be paid for at a future day, but at ſuch an exorbitant price, as to ſecure to himſelf more than legal intereſt upon the amount of their intrinſic value, this is an uſurious contract. The queſtion of uſury, or whether a contract is a colour and pretence for an uſurious loan, or is a fair and honeſt tranſaction, muſt under all its circumſtances be determined by a jury, ſubject to the correction of the court by a new trial. *Cowp.* 112. 770. *Doug.* 708. 3 *T. R.* 531.

It is now clearly ſettled that bankers and other perſons diſcounting bills, may not take 5*l. per cent.* for intereſt, but alſo a reaſonable ſum beſides, for their trouble and riſk in remitting caſh, and for other incidental expences. 3 *T. R.* 52. But ſtill whether ſuch a charge is reaſonable or uſurious, muſt be decided by a jury, aſſiſted by the direction of the judge. If a contract is entered into, to pay more than legal intereſt, though all ſecurities are immediately void, yet the penalty is not incurred till more than legal intereſt is actually paid. *Doug.* 223.

But in order to avoid a ſecurity, it muſt be ſhewn that the agreement was in its origin illegal and uſurious: it will not be uſury, if more than legal intereſt is afterwards paid, if not originally agreed for. 3 *Anſt.* 940.

If a banker deducts the diſcount of 5*l. per cent.* upon a bill, and, inſtead of paying the remainder in caſh, gives a draft for it even at a ſhort date, this has been held to be uſury; for he not only gains 5 *per cent.* but alſo the further benefit of the money till that draft is paid. If a perſon diſcounts a bill, and takes more than legal intereſt, he cannot be proſecuted for the penalty till that bill is paid in money, or money's-worth, or receives ſo much of it

a bond, he shall forfeit 20 *l.* with costs, and shall suffer imprisonment for half a year. And by statute 17 Geo. III. c. 26. to take more than ten shillings *per cent.* for procuring any money to be advanced on any life-annuity, is made an indictable misdemesnor, and punishable with fine and imprisonment: as is also the offence of procuring or soliciting any infant to grant any life-annuity; or to promise, or otherwise engage, to ratify it when he comes of age.

5. CHEATING is another offence, more immediately against public trade: as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither therefore may be referred that prodigious multitude of statutes, which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offence also of *breaking the*

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it as with the discount will amount to more than legal interest for the money he advanced. If when the bill is due, he receives only another bill in payment, the penalty cannot be incurred till the second bill is discharged. *Maddock* v. *Hammett and others.* 7 *T. R.* 184.

Where the principal is secured at all events, except the insolvency of the borrower, and yet more than 5 *l. per cent.* may be got by the terms of the contract, as by the profits of some concern, the contract is usurious. 4 *T. R.* 353.

The borrower of the money is a competent witness to prove the usury in a penal action against the lender, though he has not repaid the money; for the borrower could not give in evidence the verdict in that action, if an action were brought against him by the lender. *Smith* v. *Prager*, 7 *T. R.* 60.

But in criminal prosecutions for forgery, no one can prove a bill of exchange, bond, or other instrument a forgery, which, if valid, he would be liable to pay, unless he is released by the person to whom he is so apparently bound and answerable. *Doctor Dodd's case*, *Leach.* 141. And this still continues to be the practice in criminal courts.

See more upon usury, 1 vol. p. 463.

aſſiſe of bread, or the rules laid down by law, and particularly by the ſtatutes 31 Geo. II. c. 29. 3 Geo. III. c. 11. and 13 Geo. III. c. 62. for aſcertaining it's price in every given quantity, is reducible to this head of cheating: as is likewiſe in a peculiar manner the offence of ſelling by *falſe weights and meaſures*; the ſtandard of which fell under our conſideration in a former volume [h] (5). The puniſhment

[h] See Vol. I. pag. 274.

(5) Two acts have been lately paſſed for the prevention of falſe weights and balances; *viz.* the 35 Geo. III. c. 102. and the 37 Geo. III. c. 143.—The latter materially alters the former.

By theſe it is enacted, that the juſtices at the petty ſeſſions may appoint one perſon or more to examine the weights and balances within their diſtrict. Theſe inſpectors ſhall be ſworn to the faithful diſcharge of their office; and, as often as the juſtices ſhall direct, ſhall enter into any ſhop, mill, houſe, ſtall, or other premiſes of any perſon who ſhall ſell by retail and weight, to ſearch for and examine his weights and balances, and ſhall ſeize thoſe which are not according to the ſtandard in the Exchequer, and to bring them before the juſtices at their petty ſeſſions; and the offender being there convicted ſhall forfeit not leſs than 5*s.* nor more than 20*s.* at the diſcretion of the juſtices, together with coſts, to be levied by diſtreſs. The falſe weights and balances are to be broken, and the materials ſold. And whoever obſtructs the inſpectors in the execution of their duty, or ſhall refuſe to produce his weights and balances to them, ſhall forfeit from 5*s.* to 40*s.*

The inhabitants of any pariſh, townſhip, or place may at a veſtry meeting nominate any ſubſtantial houſeholder or houſeholders, who, if approved of by the juſtices, ſhall be the inſpectors within that pariſh, townſhip, or place; but ſuch nomination cannot be made till the inhabitants have procured ſtandard weights to be paid for out of their poor-rates. The juſtices at the quarter-ſeſſions ſhall fix the allowance of the inſpectors to be paid out of the county rate.

And they ſhall alſo order to be purchaſed out of the county rate ſtandard weights, to be depoſited with proper perſons and in convenient places, which ſhall be produced to any perſon paying a reaſonable ſum for producing the ſame.

Proſecutions muſt commence within one month after the offence.

of bakers breaking the aſſiſe, was antiently to ſtand in the pillory, by ſtatute 51 Hen. III. ſt. 6. and for brewers (by the ſame act) to ſtand in the tumbrel or dungcart [i]: which, as we learn from domeſday book, was the puniſhment for knaviſh brewers in the city of Cheſter ſo early as the reign of Edward the confeſſor. "*Malam cerevisiam faciens, in* [158] "*cathedra ponebatur ſtercoris* [j]." But now the general puniſhment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and impriſonment: though the eaſier and more uſual way is by levying on a ſummary conviction, by diſtreſs and ſale, the forfeitures impoſed by the ſeveral acts of parliament. Laſtly, any deceitful practice, in cozening another by artful means, whether in matters of trade, or otherwiſe, as by playing with falſe dice, or the like, is puniſhable with fine, impriſonment, and pillory [k]. And by the ſtatutes 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. if any man defrauds another of any valuable chattels by colour of any falſe token, counterfeit letter, or falſe pretence, or pawns or diſpoſes of another's goods without the conſent of the owner, he ſhall ſuffer ſuch puniſhment by impriſonment, fine, pillory, tranſportation, whipping, or other corporal pain, as the court ſhall direct (6).

[i] 3 Inſt. 219.
[j] Seld. tit. of hon. b. 2. c. 5. § 3.
[k] 1 Hawk. P. C. 188.

(6) In an indictment for this offence, the falſe pretences muſt be particularly ſtated and ſpecified. *The King* v. *Maſon*, 2 *T. R.* 581.

If two or more act in concert in obtaining money or goods by a falſe pretence, they may all be joined in the ſame indictment, and may be all convicted. *R.* v. *Young*. 3 *T. R.* 98.

A falſe aſſertion or affirmation, without an artful device or contrivance, will not amount to a falſe pretence; and therefore it has been determined that it is not a falſe pretence within the ſtatute to purchaſe goods, and to give a bill for them, drawn upon a banker with whom the drawer has no effects. *R.* v. *Lara*, 6 *T. R.* 565.

6. The

6. THE offence of *foreſtalling* the market is alſo an offence againſt public trade. This, which (as well as the two following) is alſo an offence at common law [l], was deſcribed by ſtatute 5 & 6 Edw. VI. c. 14. to be the buying or contracting for any merchandize or victual coming in the way to market; or diſſuading perſons from bringing their goods or proviſions there; or perſuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader.

7. REGRATING was deſcribed by the ſame ſtatute to be the buying of corn, or other dead victual, in any market, and ſelling it again in the ſame market, or within four miles of the place. For this alſo enhances the price of the proviſions, as every ſucceſſive ſeller muſt have a ſucceſſive profit.

8. ENGROSSING was alſo deſcribed to be the getting into one's poſſeſſion, or buying up, large quantities of corn or other dead victuals, with intent to ſell them again. This muſt of courſe be injurious to the public, by putting it in the power of one or two rich men to raiſe the price of proviſions at their own diſcretion. And ſo the total engroſſing of any [159] other commodity, with intent to ſell it at an unreaſonable price, is an offence indictable and fineable at the common law [m]. And the general penalty for theſe three offences by the common law (for all the ſtatutes concerning them were repealed by 12 Geo. III. c. 71.) is, as in other minute miſdemeſnors, diſcretionary fine and impriſonment [n]. Among the Romans theſe offences and other mal-practices to raiſe the price of proviſions, were puniſhed by a pecuniary mulct. "*Poena viginti aureorum ſtatuitur adverſus* "*eum, qui contra annonam fecerit, ſocietatemve coierit quo an-*"*nona carior fiat* [o]."

9. MONOPOLIES are much the ſame offence in other branches of trade, that engroſſing is in proviſions: being

[l] 1 Hawk. P. C. 234.
[m] Cro. Car. 232.
[n] 1 Hawk. P. C. 235.
[o] *Ff.* 48. 12, 2.

licence or privilege allowed by the king for the ſole buying and ſelling, making, working, or uſing of any thing whatſoever; whereby the ſubject in general is reſtrained from that liberty of manufacturing or trading which he had before [p]. Theſe had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by ſir Edward Coke [q], in the beginning of the reign of king James the firſt: but were in great meaſure remedied by ſtatute 21 Jac. I. c. 3. which declares ſuch monopolies to be contrary to law and void; (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions (7); and except alſo patents concerning printing, ſaltpetre, gunpowder, great ordnance, and ſhot;) and monopoliſts are puniſhed with the forfeiture of treble damages and double coſts, to thoſe whom they attempt to diſturb; and if they procure any action, brought againſt them for theſe damages, to be ſtayed by any extrajudicial order, other than of the court wherein it is brought, they incur the penalties of *praemunire*. Combinations alſo among victuallers or artificers, to raiſe the price of proviſions, or any commodities, or the rate of labour, are in many caſes ſeverely puniſhed by particular ſtatutes; and, in general, by ſtatute 2 & 3 Edw. VI. c. 15. with the forfeiture of 10*l.* or twenty days impriſonment, with an allowance of only bread and water, for the firſt offence; 20*l.* or the pillory, for the ſecond; and 40*l.* for the third, or
[160] elſe the pillory, loſs of one ear, and perpetual infamy. In the ſame manner, by a conſtitution of the emperor Zeno [r], all monopolies and combinations to keep up the price of merchandize, proviſions, or workmanſhip, were prohibited, upon pain of forfeiture of goods and perpetual baniſhment (8).

[p] 1 Hawk. P. C. 231. [q] 3 Inſt. 181. [r] *Cod.* 4. 59. 1.

(7) See an account of patents for new inventions, 2 vol. p. 407. n. 7.

(8) Theſe combinations are conſpiracies by the common law, and are puniſhable as miſdemeſnors at the diſcretion of the court. (*See ante, p.* 136. *n.* 4.)

The

10. To exercise a *trade* in any town, without having previously served as an *apprentice* for seven years [s], is looked upon to be detrimental to public trade, upon the supposed want of sufficient skill in the trader: and therefore is punished by statute 5 Eliz. c. 4. with the forfeiture of forty shillings by the month (9).

11. LASTLY, to prevent the destruction of our home manufactures, by *transporting and seducing our artists* to settle abroad, it is provided by statute 5 Geo. I. c. 27. that such as so entice or seduce them shall be fined 100 *l.* and be imprisoned three months; and for the second offence shall be

[s] See Vol. I. pag. 427.

The most common combination is that of journeymen manufacturers to obtain an advance of wages.

Any one workman may refuse to work till he is paid the price he pleases to fix upon his own labour; but if two or more enter into an engagement of this kind, such associations being so injurious to the interests of the public, they are guilty of a conspiracy, and may be prosecuted by an indictment or an information. But combinations amongst workmen had become so frequent that it was thought expedient to repress them by a speedier process, and therefore the 40 Geo. III. c. 106. enacted, that every person combining with others to advance their wages, or decrease the quantity of work, or any way to affect or control those who carried on any manufacture or trade in the conduct and management thereof, may be convicted before one justice of the peace, and may be committed to the common gaol for any time not exceeding three calendar months, or be kept to hard labour in the house of correction for two months.

(9) If indentures of apprenticeship are for a less term than seven years, it has been held that they may at any time be avoided by the parties, and no person whatsoever is bound by any covenants in them. 1 *Anst.* 256. Yet forty days residence under them will gain the apprentice a settlement. *Burr. Sett. Cas.* 91.

See this subject more fully stated in 1 vol. p. 428. n. 7. and p. 417. n. 7.

fined at diſcretion, and be impriſoned a year: and the artiſicers, ſo going into foreign countries, and not returning within ſix months after warning given them by the Britiſh ambaſſador where they reſide, ſhall be deemed aliens, and forfeit all their lands and goods, and ſhall be incapable of any legacy or gift. By ſtatute 23 Geo. II. c. 13. the ſeducers incur, for the firſt offence, a forfeiture of 500 *l.* for each artificer contracted with to be ſent abroad, and impriſonment for twelve months; and for the ſecond, 1000 *l.* and are liable to two years impriſonment: and by the ſame ſtatute, connected with 14 Geo. III. c. 71. if any perſon exports any tools or utenſils uſed in the ſilk, linen, cotton, or woollen manufactures, (excepting woolcards to North America [t],) he forfeits the ſame and 200 *l.* and the captain of the ſhip (having knowlege thereof) 100 *l.* and if any captain of a king's ſhip, or officer of the cuſtoms, knowingly ſuffers ſuch exportation, he forfeits 100 *l.* and his employment; and is for ever made incapable of bearing any public office: and every perſon collecting ſuch tools or utenſils, in order to export the ſame, ſhall, on conviction at the aſſiſes, forfeit ſuch tools and alſo 200 *l.* (10)

[t] Stat. 15 Geo. III. c. 5.

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(10) By the ſtatute 21 Geo. III. c. 3. if any perſon ſhall put on board any ſhip, not bound to any place in Great Britain or Ireland, or ſhall have in his cuſtody, with intent to export, any engine, tool, or implement, uſed in the woollen, cotton, linen, or ſilk manufactures, he ſhall forfeit the ſame, and alſo the ſum of 200 *l.* and ſhall be impriſoned twelve months and till the forfeiture is paid. And every captain and cuſtom-houſe officer, who ſhall knowingly receive ſuch an article, or take an entry of it, ſhall forfeit 200 *l.* By 22 Geo. III. c. 60. if any perſon ſhall entice or encourage any artificer, employed in printing callicoes, cottons, muſlins, or linens, to leave the kingdom, he ſhall forfeit 500 *l.* and be impriſoned one year. And perſons who export, or attempt to export, any engines or implements uſed in that manufacture, ſhall forfeit 500 *l.* Captains of ſhips, and cuſtom-houſe officers, conniving

niving at these offences, forfeit 100*l.* and become incapable of holding any office under the crown.

By the 25 Geo. III. c. 67. any person, who entices or encourages an artificer in the iron and steel manufactures, to leave the kingdom, shall forfeit 500*l.* and be imprisoned for one year. And persons who attempt to export any instruments specified by name in the 26 Geo. III. c. 89. shall forfeit 200*l.* and be imprisoned one year. And captains and custom-house officers, conniving at the offence, are subject to the same penalty, and become incapable of exercising any public employment.

CHAPTER THE THIRTEENTH.

OF OFFENCES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR OECONOMY.

THE fourth ſpecies of offences, more eſpecially affecting the commonwealth, are ſuch as are againſt the public *health* of the nation; a concern of the higheſt importance, and for the preſervation of which there are in many countries ſpecial magiſtrates or curators appointed.

1. THE firſt of theſe offences is a felony; but, by the bleſſing of Providence for more than a century paſt, incapable of being committed in this nation. For by ſtatute 1 Jac. I. c. 31. it is enacted, that if any perſon infected with the plague, or dwelling in any infected houſe, be commanded by the mayor or conſtable, or other head officer of his town or vill, to keep his houſe, and ſhall venture to diſobey it; he may be enforced, by the watchman appointed on ſuch melancholy occaſions, to obey ſuch neceſſary command: and, if any hurt enſue by ſuch inforcement, the watchmen are thereby indemnified. And farther, if ſuch perſon ſo commanded to confine himſelf goes abroad, and converſes in company, if he has no plague ſore upon him, he ſhall be puniſhed as a vagabond by whipping, and be bound to his good behaviour: but, if he has any infectious ſore upon him, uncured, he then ſhall be guilty of felony. By the ſtatute 26 Geo. II. c. 26. (explained and amended by 29 Geo. II. c. 8. (1),) the

(1) And further enforced and regulated by 28 Geo. III. c. 34.

method

method of performing *quarantine*, or forty days probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly, and masters of ships coming from infected places and disobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The same penalty also attends persons escaping from the *lazarets*, or [162] places wherein quarantine is to be performed; and officers and watchmen neglecting their duty; and persons conveying goods or letters from ships performing quarantine (2).

2. A SECOND, but much inferior species, of offence against public health is the selling of *unwholesome provisions*. To prevent which the statute 51 Hen. III. st. 6. and the ordinance for bakers, c. 7. prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. II. c. 25. §11. any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant; and 40*l.* if done by the vintner or retail trader. These are all the offences which may properly be said to respect the public health.

V. THE last species of offences which especially affect the commonwealth, are those against the public *police* and *oeconomy*.

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(2) By 39 & 40 Geo. III. c. 80. all the former acts for performance of quarantine are repealed, and the regulations, which are very numerous, are incorporated into that act.

Amongst these it is provided, that if a ship come from any place visited with the plague, or other infectious disease, or shall have any person on board actually infected, if the commander shall conceal the same, he shall be guilty of felony without benefit of clergy.

And if, whilst the ship is performing quarantine, he quits the ship himself, or permits any other person to quit it, he forfeits 500*l.* and every other person quitting it shall suffer six months imprisonment, and shall forfeit 200*l.* See 3 *Burn*, tit. Plague.

By the public police and oeconomy I mean the due regulation and domeſtic order of the kingdom: whereby the individuals of the ſtate, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, induſtrious, and inoffenſive in their reſpective ſtations. This head of offences muſt therefore be very miſcellaneous, as it comprizes all ſuch crimes as eſpecially affect public ſociety, and are not comprehended under any of the four preceding ſpecies. Theſe amount, ſome of them to felony, and others to miſdemeſnors only. Among the former are,

1. THE offence of *clandeſtine marriages*: for by the ſtatute 26 Geo. II. c. 33. 1. To ſolemnize marriage in any other place beſides a church, or public chapel wherein banns have been uſually publiſhed, except by licence from the archbiſhop of Canterbury;—and, 2. To ſolemnize marriage in ſuch church or chapel without due publication of banns, or
[163] licence obtained from a proper authority;—do both of them not only render the marriage void, but ſubject the perſon ſolemnizing it to felony, puniſhed by tranſportation, for fourteen years: as, by three former ſtatutes [a], he and his aſſiſtants were ſubject to a pecuniary forfeiture of 100 *l.* 3. To make a falſe entry in a marriage regiſter; to alter it when made; to forge, or counterfeit, ſuch entry, or a marriage licence; to cauſe or procure, or act or aſſiſt in ſuch forgery; to utter the ſame as true, knowing it to be counterfeit; or to deſtroy or procure the deſtruction of any regiſter, in order to vacate any marriage, or ſubject any perſon to the penalties of this act; all theſe offences, knowingly and wilfully committed, ſubject the party to the guilt of felony without benefit of clergy.

2. ANOTHER felonious offence, with regard to this holy eſtate of matrimony, is what ſome have corruptly called

[a] 6 & 7 W. III. c. 6. 7 & 8 W. III. c. 35. 10 Ann. c. 19. § 176.

bigamy,

bigamy, which properly ſignifies being twice married; but is more juſtly denominated *polygamy*, or having a plurality of wives at once [b]. Such ſecond marriage, living the former huſband or wife, is ſimply void, and a mere nullity, by the eccleſiaſtical law of England: and yet the legiſlature has thought it juſt to make it felony, by reaſon of it's being ſo great a violation of the public oeconomy and decency of a well-ordered ſtate. For Polygamy can never be endured under any rational civil eſtabliſhment, whatever ſpecious reaſons may be urged for it by the eaſtern nations, the fallacioufneſs of which has been fully proved by many ſenſible writers: but in northern countries the very nature of the cli- [164] mate ſeems to reclaim againſt it: it never having obtained in this part of the world, even from the time of our German anceſtors, who, as Tacitus informs us [c], "*prope ſoli barbarorum ſingulis uxoribus contenti ſunt.*" It is therefore puniſhed by the laws both of antient and modern Sweden with death [d]. And with us in England it is enacted by ſtatute 1 Jac. I. c. 11. that if any perſon, being married, do afterwards marry again, the former huſband or wife being alive, it is felony; but within the benefit of clergy. The firſt wife in this caſe ſhall not be admitted as a witneſs againſt her huſband, becauſe ſhe is the true wife; but the ſecond may, for ſhe is indeed no wife at all [e]: and ſo, *vice verſa*, of a ſecond huſband. This act makes an exception to five caſes, in which ſuch ſecond marriage, though in the three firſt it is void, is yet no felony [f].

[b] 3 Inſt. 88. Bigamy, according to the canoniſts, conſiſted in marrying two virgins ſucceſſively, one after the death of the other, or in once marrying a widow. Such were eſteemed incapable of orders, &c.; and by a canon of the council of Lyons, *A. D.* 1274, held under pope Gregory X. were *omni privilegio clericali nudati, et coercioni fori ſeculariſ addicti.* (6 *Decretal.* 1. 12.) This canon was adopted and explained in England, by ſtatute 4 Edw. I. ſt. 3. c. 5. and *bigamy* thereupon became no uncommon counterplea to the claim of the benefit of clergy. (*M.* 40 *Edw. III.* 42. *M.* 11 *Hen. IV.* 11. 48. *M.* 13 *Hen. IV.* 6. Staunf. P. C. 134.) The cognizance of the plea of *bigamy* was declared by ſtatute 18 Edw. III. ſt. 3. c. 2. to belong to the court chriſtian, like that of *baſtardy*. But by ſtat. 1 Edw. VI. c. 12. § 16. *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21. Dyer 201.

[c] *de mor. Germ.* 18.

[d] Stiernh. *de jure Sueon. l.* 3. *c.* 2.

[e] 1 Hal. P. C. 693.

[f] 3 Inſt. 89. Kel. 27. 1 Hal. P. C. 694.

1. Where either party hath been continually *abroad* for seven years whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been absent from the other seven years *within* this kingdom, and the remaining party hath had no knowlege of the other's being alive within that time. 3. Where there is a divorce (or separation *a mensa et thoro*) by sentence in the ecclesiastical court (3). 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo* (4). Or, 5. Where either of the parties was under the age of consent at the time of the first marriage, for in such case the first marriage was voidable by the disagreement of either party, which the second marriage very clearly amounts to. But if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real mar-

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(3) But if a person marries again under the three first exceptions, though the second marriage is not felony, yet as before the statute it is null and void, and the parties will be subject to the censures and punishment of the ecclesiastical courts.

By the 35 Geo. III. c. 67. persons convicted of bigamy are rendered subject to the same punishment, as those are who are convicted of grand or petit larceny. Before this statute they were liable to be burnt in the hand, and imprisoned for any time not exceeding one year; and by the 19 Geo. III. c. 74. the burning in the hand might be changed into a fine, or into public or private whipping, not more than three times. The effect of this statute is, that burning in the hand may be changed into transportation for seven years, and the imprisonment as for petty larceny may be unlimited.

(4) In the duchess of Kingston's case the judges were unanimously of opinion, "That a sentence in the spiritual court against "a marriage in a suit of jactitation of marriage is not conclusive "evidence, so as to stop the counsel for the crown from proving "the marriage in an indictment for polygamy. And admitting "such sentence to be conclusive upon such indictment, the counsel "for the crown may be admitted to avoid the effect of such sen-"tence, by proving the same to have been obtained by fraud or "collusion." 11 *Harg. St. T. R.* 262.

riage;

riage; and afterwards one of them ſhould marry again; I ſhould apprehend that ſuch ſecond marriage would be within the reaſon and penalties of the act.

3. A THIRD ſpecies of felony againſt the good order and oeconomy of the kingdom, is by idle *ſoldiers* and *mariners wandering* about the realm, or perſons pretending ſo to be, [165] and abuſing the name of that honourable profeſſion [g]. Such a one not having a teſtimonial or paſs from a juſtice of the peace, limiting the time of his paſſage; or exceeding the time limited for fourteen days, unleſs he falls ſick; or forging ſuch teſtimonial; is by ſtatute 39 Eliz. c. 17. made guilty of felony without benefit of clergy. This ſanguinary law, though in practice deſervedly antiquated, ſtill remains a diſgrace to our ſtatute-book: yet attended with this mitigation, that the offender may be delivered, if any honeſt freeholder or other perſon of ſubſtance will take him into his ſervice, and he abides in the ſame for one year; unleſs licenſed to depart by his employer, who in ſuch caſe ſhall forfeit ten pounds (5).

4. OUTLANDISH perſons calling themſelves *Egyptians*, or *gypſies*, are another object of the ſeverity of ſome of our unrepealed ſtatutes. Theſe are a ſtrange kind of commonwealth among themſelves of wandering impoſtors and jugglers, who were firſt taken notice of in Germany about the beginning of the fifteenth century, and have ſince ſpread themſelves all over Europe. Munſter [h], who is followed and relied upon by Spelman [i] and other writers, fixes the time of their firſt appearance to the year 1417; under paſſports, real or pretended,

[g] 3 Inſt. 85. [h] *Coſmogr. l.* 3. [i] *Gloſſ.* 193.

(5) In the vagrant act the 17 Geo. II. c. 5. there is an exception in favour of ſoldiers having certificates from their officers, or the ſecretary at war; and alſo in favour of mariners having a teſtimonial from a juſtice of peace, who were thus licenſed to beg. But by 32 Geo. III. c. 45. ſuch certificates and teſtimonials were very properly declared to be null and void; and that all ſoldiers and mariners, who ſhould wander abroad and beg, ſhould be deemed rogues and vagabonds within the meaning of the vagrant act.

from

from the emperor Sigiſmund, king of Hungary. And pope Pius II. (who died *A. D.* 1464) mentions them in his hiſtory as thieves and vagabonds, then wandering with their families over Europe, under the name of Zigari; and whom he ſuppoſes to have migrated from the country of the Zigi, which nearly anſwers to the modern Circaſſia. In the compaſs of a few years they gained ſuch a number of idle proſelytes, (who imitated their language and complexion, and betook themſelves to the ſame arts of chiromancy, begging, and pilfering,) that they became troubleſome and even formidable to moſt of the ſtates of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591 [k]. And the government in England took the alarm much earlier: for in 1530, they are deſcribed by ſtatute 22 Hen. VIII. c. 10. as
[166] "outlandiſh people, calling themſelves Egyptians, uſing no "craft nor feat of merchandize, who have come into this "realm and gone from ſhire to ſhire and place to place in "great company, and uſed great, ſubtil, and crafty means "to deceive the people; bearing them in hand, that they "by palmeſtry could tell men's and women's fortunes; and "ſo many times by craft and ſubtilty have deceived the peo- "ple of their money, and alſo have committed many heinous "felonies and robberies." Wherefore they are directed to avoid the realm, and not to return under pain of impriſonment, and forfeiture of their goods and chattels: and, upon their trials for any felony which they may have committed, they ſhall not be entitled to a jury *de medietate linguae*. And afterwards, it is enacted by ſtatute 1 & 2 Ph. & M. c. 4. and 5 Eliz. c. 20. that if any ſuch perſons ſhall be imported into this kingdom, the importer ſhall forfeit 40*l*. And if the Egyptians themſelves remain one month in this kingdom; or if any perſon, being fourteen years old, (whether natural born ſubject or ſtranger,) which hath been ſeen or found in the fellowſhip of ſuch Egyptians, or which hath diſguiſed him or herſelf like them, ſhall remain in the ſame one month, at one or ſeveral times; it is felony without benefit of clergy:

[k] Dufreſne *Gloſſ.* I. 200.

and

and sir Matthew Hale informs us [l], that at one Suffolk assizes no less than thirteen gypsies were executed upon these statutes a few years before the restoration. But, to the honour of our national humanity, there are no instances more modern than this, of carrying these laws into practice (6).

5. To descend next to offences, whose punishment is short of death. *Common nusances* are of a species of offences against the public order and oeconomical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires [m]. The nature of *common* nusances, and their distinction from *private* nusances, were explained in the preceding volume [n]: when we considered more particularly the [167] nature of the private sort, as a civil injury to individuals. I shall here only remind the student, that common nusances are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects. Of this nature are, 1. Annoyances in *highways*, *bridges*, and public *rivers*, by rendering the same inconvenient or dangerous to pass: either positively, by actual obstructions; or negatively, by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distreined to repair and amend them, and in some cases fined. And a presentment thereof by a judge of assize, &c. or a justice of the peace, shall be in all respects

[l] 1 Hal. P. C. 671. [m] 1 Hawk. P. C. 197. [n] Vol. III. pag. 216.

(6) The severe statute of 5 Eliz. c. 20. is repealed by 23 Geo. III. c. 51. And gypsies are now only punishable under the vagrant act, which declares that "all persons, pretending to be gypsies, or wandering in the habit or form of Egyptians, shall be deemed rogues and vagabonds." 17 Geo. II. c. 5.

equivalent to an indictment [o]. Where there is an house erected, or an inclosure made, upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a *purpresture* [p]. 2. All those kinds of nusances, (such as offensive trades and manufactures,) which when injurious to a private man are actionable, are, when detrimental to the public, punishable by public prosecution, and subject to fine according to the quantity of the misdemesnor: and particularly the keeping of hogs in any city or market town is indictable as a public nusance [q]. 3. All disorderly *inns* or *ale-houses*, *bawdy-houses*, *gaming-houses*, *stage-plays* unlicensed, booths and stages for *rope-dancers*, *mountebanks*, and the like, are public nusances, and may upon indictment be suppressed and fined [r] (7). Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the inn-keepers fined, if they refuse to entertain a traveller without a very
[168] sufficient cause: for thus to frustrate the end of their institution is held to be disorderly behaviour [s]. Thus too the hospitable laws of Norway punish, in the severest degree, such inn-keepers as refuse to furnish accommodations at a just and reasonable price [t]. 4. By statute 10 & 11 W. III. c. 17. all *lotteries* are declared to be public nusances, and all grants, patents, or licences for the same to be contrary to law. But, as state-lotteries have, for many years past, been found a ready mode for raising the supply, an act was made 19 Geo. III. c. 21. to license and regulate the keepers of such lottery-offices (8). 5. The making and selling of *fire-works* and *squibs*,

[o] Stat. 7 Geo. III. c. 42.

[p] Co. Litt. 277. from the French *pourpris*, an inclosure.

[q] Salk. 460.

[r] 1 Hawk. P. C. 198. 225.

[s] 1 Hawk. P. C. 225.

[t] Stiernh. *de jure Sueon. l. 2. c. 9.*

(7) How stage-players are to be licensed, see the 28 Geo. III. c. 30. or the title *Players*, in Burn's Justice.

(8) The 19 Geo. III. c. 21. is repealed by the 22 Geo. III. c. 47. which introduces a great variety of regulations respecting lottery-office keepers. Among others it enacts, that no one shall keep an office for the sale of tickets in the public lottery, without a licence

or throwing them about in any ſtreet, is, on account of the danger that may enſue to any thatched or timber buildings, declared to be a common nuſance, by ſtatute 9 & 10 W. III. c. 7. and therefore is puniſhable by fine (9). And to this head we may refer (though not declared a common nuſance) the making, keeping, or carriage, of too large a quantity of *gunpowder* at one time, or in one place or vehicle; which is prohibited by ſtatute 12 Geo. III. c. 61. under heavy penalties and forfeiture. 6. *Eaves-droppers*, or ſuch as liſten under walls or windows or the eaves of a houſe, to hearken

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licence from the ſtamp office, under a penalty of 100*l.* And if any perſon ſhall ſell the chance or ſhare of a ticket for leſs time than the whole time of drawing, or ſhall inſure for or againſt the drawing of any ticket, or ſhall receive any money to return money or goods upon any contingency depending upon the tickets in the lottery, he ſhall forfeit 50*l.* And by the 27 Geo. III. c. 1. perſons guilty of any of the preceding offences, may alſo be proceeded againſt as rogues and vagabonds, under the vagrant act; but if they are convicted as vagabonds, they are diſcharged from the pecuniary penalties. And no perſon ſhall ſell any ſhare leſs than a ſixteenth, or without a ſtamp, under a penalty of 50*l.* But the owner of a whole ticket may inſure his ticket with a licenſed lottery-office keeper, ſo as to indemnify himſelf, and receive its value only. The inſurance muſt be made for the whole remaining time of the drawing of the lottery, and in the manner preſcribed by the act. If any editor of a newſpaper, or other perſon, advertizes any illegal ſcheme of gaming in the lottery, he is ſubject to a penalty of 50*l.* 4 *T. R.* 414. The penalties under theſe ſtatutes muſt be ſued for within ſix months in the courts at Weſtminſter, and the defendant may be held to bail, to the amount of 500*l.* One half of the penalties is given to the proſecutor, the other half to the king.

(9) And if any perſon ſhall make or ſell any ſquibs, rockets, or fire-works, he ſhall forfeit, upon conviction before a magiſtrate, 5*l.* one half to the informer, and the other half to the poor. And if any perſon ſhall throw or fire them into any houſe, ſtreet, or highway, he ſhall forfeit 20*s.* in like manner. 9 & 10 W. III. c. 7.

after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet [t]: or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour [u]. 7. Lastly, a *common scold*, *communis rixatrix*, (for our law-latin confines it to the feminine gender,) is a public nuisance to her neighbourhood. For which offence she may be indicted [v]; and, if convicted, shall [w] be sentenced to be placed in a certain engine of correction called the trebucket, castigatory, or *cucking* stool, which in the Saxon language is said to signify the scolding stool; though now it is frequently corrupted into *ducking* stool, because the residue of the judgment is, that, when she is so placed therein, she shall be plunged in the water for her punishment [x].

[169] 6. IDLENESS in any person whatsoever is also a high offence against the public oeconomy. In China it is a maxim, that if there be a man who does not work, or a woman that is idle, in the empire, somebody must suffer cold or hunger; the produce of the lands not being more than sufficient, with culture, to maintain the inhabitants: and therefore, though the idle person may shift off the want from himself, yet it must in the end fall somewhere. The court also of Areopagus at Athens punished idleness, and exerted a right of examining every citizen in what manner he spent his time; the intention of which was [y], that the Athenians, knowing they were to give an account of their occupations, should follow only such as were laudable, and that there might be no room left for such as lived by unlawful arts. The civil law expelled all sturdy vagrants from the city [z]: and, in our own law, all idle persons or vagabonds, whom our antient statutes describe to be "such as wake on the night, and sleep on the "day, and haunt customable taverns, and ale-houses, and "routs about; and no man wot from whence they come, ne "whether they go;" or such as are more particularly described

[t] Kitch. of courts. 20.
[u] *Ibid.* 1 Hawk. P. C. 132.
[v] 6 Mod. 213.
[w] 1 Hawk. P. C. 198, 200.
[x] 3 Inst. 219.
[y] Valer. Maxim. *l.* 2. *c.* 6.
[z] *Nov.* 80. *c.* 5.

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by ſtatute 17 Geo. II. c. 5. and divided into three claſſes, *idle* and *diſorderly* perſons, *rogues* and *vagabonds*, and *incorrigible rogues*;—all theſe are offenders againſt the good order, and blemiſhes in the government, of any kingdom (10). They

(10) Idle and diſorderly perſons are, 1. Thoſe who threaten to run away, and to leave their families upon the pariſh; 2. Who return from the pariſh to which they are removed as paupers, without a certificate; 3. Who refuſe to work for the uſual wages; 4. Who beg within their own pariſhes; 5. And who neglect to work, or who ſpend their money idly, without making a ſufficient allowance for the ſubſiſtence of their families. Rogues and vagabonds are thus deſcribed: 1. Gatherers of alms, under pretence of loſſes, or for priſons or hoſpitals; 2. Fencers; 3. Bearwards; 4. Players of interludes, not being authoriſed by law; 5. Minſtrels; 6. Jugglers; 7. Gypſies; 8. Fortune-tellers; 9. Deceivers by ſubtil craft; 10. Players and betters at unlawful games; 11. Perſons who run away and leave their families chargeable to the pariſh; 12. Unlicenſed pedlars; 13. Perſons who wander abroad, and lodge in alehouſes, outhouſes, or in the open air, without giving a good account of themſelves; 14. Perſons wandering from home, under pretence of ſeeking harveſt-work, without a certificate from the miniſter and one church-warden of their pariſh; 15. And all wandering beggars. And by 28 Geo. III. c. 88. all perſons who are apprehended with any pick-lock or implement, with intent to felonioufly break and enter any dwelling-houſe, or with any offenſive weapon, with intent to felonioufly aſſault any perſon; or who ſhall be found in, or upon, any dwelling-houſe, outhouſe, yard, area, or garden, with intent to ſteal, ſhall be deemed rogues and vagabonds.

Rogues and vagabonds, who eſcape when they are apprehended, or refuſe to go before a juſtice, or to be examined, or who give a falſe account of themſelves, after warning of the conſequences, or who refuſe to be conveyed by a paſs, or who eſcape from the houſe of correction, or who commit, after puniſhment, a ſecond offence, become incorrigible rogues. When a perſon is convicted of being a rogue and vagabond, before a juſtice of peace, the juſtice may order him to be whipt, or impriſoned till the next ſeſſions, or for any leſs time; and if impriſoned till the next ſeſſions, the juſtices may then order a further impriſonment for ſix months;

are therefore all puniſhed, by the ſtatute laſt mentioned; that is to ſay, idle and diſorderly perſons with one month's impriſonment in the houſe of correction; rogues and vagabonds with whipping and impriſonment not exceeding ſix months; and incorrigible rogues with the like diſcipline and confinement, not exceeding two years; the breach and eſcape from which confinement in one of an inferior claſs, ranks him among incorrigible rogues; and in a rogue (before incorrigible) makes him a felon, and liable to be tranſported for ſeven years. Perſons harbouring vagrants are liable to a fine of forty ſhillings, and to pay all expences brought upon the pariſh thereby: in the ſame manner as, by our antient
[170] laws, whoever harboured any ſtranger for more than two nights, was anſwerable to the public for any offence that ſuch his inmate might commit [a].

7. UNDER the head of public oeconomy may alſo be properly ranked all ſumptuary laws againſt *luxury*, and extrava-

[a] *LL. Edw. c.* 27. *Bracton. l.* 3. *tr.* 2. c. 10. § 2.

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female vagabonds are ſubject to the ſame impriſonment, but in no inſtance are liable to whipping, 32 Geo. III. c. 45. And the juſtice, or the court of quarter ſeſſions, may, if they think proper, order a vagabond, after puniſhment, to be conveyed to his place of ſettlement by a paſs, but no juſtice of peace ſhall order any vagrant to be conveyed by a paſs, who has not been actually whipt, or impriſoned for at leaſt ſeven days, which ſhall be certified in the paſs. 32 Geo. III. c. 45. The object of this was to correct an abuſe, which much prevailed, of removing paupers by a paſs, who had committed no act of vagrancy, and who ought to have been removed by an order of removal. For the effects of an order of removal and a vagrant paſs are very different; in the firſt caſe, the pariſh removing bears all the travelling expences of the paupers; but the expence of conveying vagrants by a paſs, is borne by each county through which they are carried. And no appeal lies againſt a vagrant paſs, ſo that the pariſh to which the vagrant is conveyed, muſt be at the expence of ſending, by an order of removal, the vagrant back again, or to ſuch place as, upon inquiry, may be thought his legal ſettlement. 3 *Burn.* tit. Vagrants, c. x.

gant expences in dreſs, diet, and the like; concerning the general utility of which to a ſtate, there is much controverſy among the political writers. Baron Monteſquieu lays it down [b], that luxury is neceſſary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whoſe government is compounded of both ſpecies, it may ſtill be a dubious queſtion how far private luxury is a public evil; and as ſuch cognizable by public laws. And indeed our legiſlators have ſeveral times changed their ſentiments as to this point; for formerly there were a multitude of penal laws exiſting, to reſtrain exceſs in apparel [c]; chiefly made in the reigns of Edward the third, Edward the fourth, and Henry the eighth, againſt piked ſhoes, ſhort doublets, and long coats; all of which were repealed by ſtatute 1 Jac. I. c. 25. But, as to exceſs in diet, there ſtill remains one antient ſtatute unrepealed, 10 Edw. III. ſt. 3. which ordains, that no man ſhall be ſerved, at dinner or ſupper, with more than two courſes; except upon ſome great holidays there ſpecified, in which he may be ſerved with three.

8. NEXT to that of luxury, naturally follows the offence [171] of *gaming*, which is generally introduced to ſupply or retrieve the expences occaſioned by the former: it being a kind of tacit confeſſion, that the company engaged therein do, in general, exceed the bounds of their reſpective fortunes; and therefore they caſt lots to determine upon whom the ruin ſhall at preſent fall, that the reſt may be ſaved a little longer. But, taken in any light, it is an offence of the moſt alarming nature; tending by neceſſary conſequence to promote public idleneſs, theft and debauchery among thoſe of a lower claſs; and, among perſons of a ſuperior rank, it hath frequently been attended with the ſudden ruin and deſolation of antient and opulent families, an abandoned proſtitution of every principle of honour and virtue, and too often hath ended in ſelf-murder. To reſtrain this pernicious vice, among the inferior ſort of people, the ſtatute 33 Hen. VIII. c. 9. was

[b] Sp. L. b. 7. c. 2 & 4. [c] 3 Inſt. 199.

made; which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diversions there ſpecified [d], unleſs in the time of chriſtmas, under pecuniary pains and impriſonment. And the ſame law, and alſo the ſtatute 30 Geo. II. c. 24. inflict pecuniary penalties, as well upon the maſter of any public houſe wherein ſervants are permitted to game, as upon the ſervants themſelves who are found to be gaming there. But this is not the principal ground of modern complaint: it is the gaming in high life, that demands the attention of the magiſtrate; a paſſion to which every valuable conſideration is made a ſacrifice, and which we ſeem to have inherited from our anceſtors the antient Germans; whom Tacitus [e] deſcribes to have been bewitched with the ſpirit of play to a moſt exorbitant degree. "They addict themſelves, ſays he, to dice (which is wonderful) when ſober, and as a ſerious employment; with "ſuch a mad deſire of winning or loſing, that, when ſtript "of every thing elſe, they will ſtake at laſt their liberty [172] "and their very ſelves. The loſer goes into a voluntary "ſlavery, and, though younger and ſtronger than his antagoniſt, ſuffers himſelf to be bound and ſold. And this per"ſeverance in ſo bad a cauſe they call the point of honour: "*ea eſt in re prava pervicacia, ipſi fidem vocant.*" One would almoſt be tempted to think Tacitus was deſcribing a modern Engliſhman. When men are thus intoxicated with ſo frantic a ſpirit, laws will be of little avail: becauſe the ſame falſe ſenſe of honour, that prompts a man to ſacrifice himſelf, will deter him from appealing to the magiſtrate. Yet it is proper that laws ſhould be, and be known publicly, that gentlemen may conſider what penalties they wilfully incur, and what a confidence they repoſe in ſharpers; who, if ſucceſsful in play, are certain to be paid with honour, or, if unſucceſsful, have it in their power to be ſtill greater gainers by informing. For by ſtatute 16 Car. II. c. 7. if any perſon by playing or betting ſhall loſe more than 100*l.* at one time, he ſhall not

[d] Logetting in the fields, ſlide-thrift or ſhove-groat, cloyiſh cayles, half-bowl, and coyting.

[e] *de mor. Germ.* c. 24.

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be compellable to pay the ſame; and the winner ſhall forfeit treble the value, one moiety to the king, the other to the informer. The ſtatute 9 Ann. c. 14. enacts, that all bonds and other ſecurities, given for money won at play, or money lent at the time to play withal, ſhall be utterly void; that all mortgages and incumbrances of lands, made upon the ſame conſideration, ſhall be and enure to the uſe of the heir of the mortgagor: that, if any perſon at any time or ſitting loſes 10*l.* at play, he may ſue the winner, and recover it back by action of debt at law; and in caſe the loſer does not, any other perſon may ſue the winner for treble the ſum ſo loſt (10); and the plaintiff may by bill in equity examine the defendant himſelf upon oath: and that in any of theſe ſuits no privilege of parliament ſhall be allowed. The ſtatute farther [173] enacts, that if any perſon by cheating at play ſhall win any money or valuable thing, or ſhall at any one time or ſitting win more than 10*l.* he may be indicted thereupon, and ſhall forfeit five times the value to any perſon who will ſue for it; and (in caſe of cheating) ſhall be deemed infamous, and ſuffer ſuch corporal puniſhment as in caſe of wilful perjury. By ſeveral ſtatutes of the reign of king George II. [f], all private lotteries by tickets, cards, or dice, (and particularly the games of faro, baſſet, ace of hearts, hazard, paſſage, rolly

[f] 12 Geo. II. c. 28. 13 Geo. II. c. 19. 18 Geo. II. c. 34.

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(10) If the loſer does not recover back the money loſt within three months, any other perſon may recover the ſame, and treble the amount beſides, with coſts, one half for himſelf, the other half for the poor. See 1 vol. p. 88. *n.* 20. If money be lent to game with, it may be recovered back as money lent, though the bond, note, or other ſecurity given for it is void. 2 *Burr.* 1077.

A bill in equity may be filed to diſcover the conſideration of a promiſſory note or other ſecurity alleged to be given for money loſt at play, and to have it delivered up. *Andrews* v. *Berry*, 3 *Anſt.* 634.

In an action againſt A, to recover back money loſt, A may plead that it was not won by him alone, but jointly with B. 7 *T. R.* 257.

polly, and all other games with dice, except back-gammon,) are prohibited under a penalty of 200*l.* for him that ſhall erect ſuch lotteries, and 50*l.* a time for the players. Public lotteries, unleſs by authority of parliament, and all manner of ingenious devices, under the denomination of ſales or otherwiſe, which in the end are equivalent to lotteries, were before prohibited by a great variety of ſtatutes [g] under heavy pecuniary penalties. But particular deſcriptions will ever be lame and deficient, unleſs all games of mere chance are at once prohibited; the inventions of ſharpers being ſwifter than the puniſhment of the law, which only hunts them from one device to another. The ſtatute 13 Geo. II. c. 19. to prevent the multiplicity of horſe races, another fund of gaming, directs that no plates or matches under 50*l.* value ſhall be run, upon penalty of 200*l.* to be paid by the owner of each horſe running, and 100*l.* by ſuch as advertiſe the plate (11). By ſtatute 18 Geo. II. c. 34. the ſtatute 9 Ann.

[g] 10 & 11 W. III. c. 17. 9 Ann. 8 Geo. I. c. 2. § 36, 37. 9 Geo. I. c. 19. c. 6. § 56. 10 Ann. c. 26. § 109. § 4, 5. 6 Geo. II. c. 35. § 29, 30.

(11) Newmarket and Black Hambleton are excepted, where a race may be run for any ſum or ſtake leſs than fifty pounds. But though ſuch horſe races are lawful, yet it has been determined, that they are games within the ſtatute of 9 Ann. c. 14. and that of conſequence wagers above 10*l.* upon a lawful horſe race, are illegal. 2 *Bl. Rep.* 706. A foot race, and a race againſt time, have alſo been held to be games within the ſtatute of gaming. 2 *Wilſ.* 36. So a wager to travel a certain diſtance within a certain time, with a poſtchaiſe and a pair of horſes, has been conſidered of the ſame nature. 6 *T. R.* 499. A wager for leſs than 10*l.* upon an illegal horſe race, is alſo void and illegal. 4 *T. R.* 1. Wagers in general, by the common law, were lawful contracts, and all wagers may ſtill be recovered in a court of juſtice, which are not made upon games, or which are not ſuch as are likely to diſturb the public peace, or to encourage immorality, or ſuch as will probably affect the intereſts, characters, and feelings of perſons not parties to the wager, or ſuch as are contrary to ſound policy, or the general intereſts of the community. See 3 *T. R.* 693. where the legality of wagers is fully diſcuſſed.

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is farther enforced, and ſome deficiencies ſupplied: the forfeitures of that act may now be recovered in a court of equity; and, moreover, if any man be convicted upon information or indictment of winning or loſing at play, or by betting at any one time 10*l.* or 20*l.* within twenty-four hours, he ſhall be fined five times the ſum for the benefit of the poor of the pariſh. Thus careful has the legiſlature been to prevent this deſtructive vice: which may ſhow that our laws againſt gaming are not ſo deficient, as ourſelves [174] and our magiſtrates in putting thoſe laws in execution.

9. LASTLY, there is another offence, conſtituted by a variety of acts of parliament; which are ſo numerous and ſo confuſed, and the crime itſelf of ſo queſtionable a nature, that I ſhall not detain the reader with many obſervations thereupon. And yet it is an offence which the ſportſmen of England ſeem to think of the higheſt importance; and a matter, perhaps the only one, of general and national concern: aſſociations having been formed all over the kingdom to prevent it's deſtructive progreſs. I mean the offence of deſtroying ſuch beaſts and fowls, as are ranked under the denomination of *game*: which, we may remember, was formerly obſerved [h], (upon the old principles of the foreſt law,) to be a treſpaſs and offence in all perſons alike, who have not authority from the crown to kill game, (which is royal

[h] See Vol. II. pag. 417, &c.

Where a perſon had given 100*l.* upon condition of receiving 300*l.* if peace was not concluded with France within a certain time, and he afterwards brought his action to recover the 300*l.*, it was held, the wager was void, as being inconſiſtent with general policy, but he was allowed to recover back the 100*l.* which he had paid, under a count for ſo much money had and received by the defendant to his uſe. 7 *T. R.* 535. So alſo, a perſon was permitted to recover back his ſhare of a wager againſt a ſtakeholder upon a boxing match, 5 *T. R.* 405. the court not conſidering the conduct of the plaintiff in theſe inſtances ſo criminal as to deprive him of the benefit of their aſſiſtance.

property),

property,) by the grant of either a free warren, or at leaſt a manor of their own. But the laws, called the game laws, have alſo inflicted additional puniſhments (chiefly pecuniary) on perſons guilty of this general offence, unleſs they be people of ſuch rank or fortune as is therein particularly ſpecified. All perſons therefore, of what property or diſtinction ſoever, that kill game out of their own territories, or even upon their own eſtates, without the king's licence expreſſed by the grant of a franchiſe, are guilty of the firſt original offence, of encroaching on the royal prerogative (12). And thoſe indigent perſons who do ſo, without having ſuch rank or fortune as is generally called a qualification, are guilty not only of the original offence, but of the aggravations alſo, created by the ſtatutes for preſerving the game: which aggravations are ſo ſeverely puniſhed, and thoſe puniſhments ſo implacably inflicted, that the offence againſt the king is ſeldom thought of, provided the miſerable delinquent can make his peace with the lord of the manor. This offence, thus aggravated, I have ranked under the preſent head, becauſe the only rational footing, upon which we can conſider it as a crime, is, that in low and indigent perſons it promotes idleneſs, and takes them away from their proper employments and callings: [175] which is an offence againſt the public police and oeconomy of the commonwealth.

THE ſtatutes for preſerving the game are many and various, and not a little obſcure and intricate; it being remarked[1], that in one ſtatute only, 5 Ann. c. 14. there is falſe grammar in no fewer than ſix places, beſides other miſtakes: the occaſion of which, or what denomination of perſons were probably the penners of theſe ſtatutes, I ſhall not at preſent inquire. It is in general ſufficient to obſerve, that

[1] Burn's Juſtice, tit. Game, § 3.

(12) This doctrine, ſo frequently repeated by the learned commentator, that no perſon had originally, or has now, a right to kill game upon his own eſtate, without a licence, or grant from the king, is controverted at large, by the editor, in 2 vol. p. 419. *n.* 10.

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the *qualifications* for killing game, as they are usually called, or more properly the *exemptions* from the penalties inflicted by the statute law, are, 1. The having a freehold estate of 100*l. per annum;* there being fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the shire: 2. A leasehold for ninety-nine years of 150*l. per annum:* 3. Being the son and heir apparent of an esquire (a very loose and vague description) or person of superior degree (13): 4. Being the owner, or keeper, of a

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(13) It is not necessary that it should be a freehold, or a legal estate, for copyhold, or an equitable estate of inheritance of the clear value of 100*l. per annum*, is a qualification. But it is not sufficient, if the value of the estate is reduced below that sum by the interest of a mortgage. *Cald. Cas.* 230. A life-estate, as a church benefice, must be of the clear annual value of 150*l.* See 1 vol. p. 60. *n.* 9. The eldest son of an esquire, or of any person of higher degree, is qualified without any estate, whilst his father is living; but the father himself, though an esquire, doctor, knight, or person of still higher rank, is not qualified without having the estate required by the statute. *Jones* v. *Smart*, 1 *T. R.* 44. But by the 25 Geo. III. c. 50. and 31 Geo. III. c. 21. every person, who shall go in pursuit of game, without taking out a certificate from the clerk of the peace of the county or district within which such person resides, shall forfeit 20*l.* The clerk of the peace shall receive for the certificate 3*l.* 4*s.* and the certificate shall be in force from the day of its date till the first of July next following. And if any person shall produce his certificate to any other person, who is in pursuit of game, he may demand of him to shew his certificate, and if he does not, he may then demand of him his name, and place of abode, which if he refuses to give, or gives a false name or place of residence, he shall forfeit 5*l.* These penalties may be recovered by an action with costs for the sole use of the plaintiff; or by an information before a justice of the peace: but in that case if the prosecution is commenced within six months, one half of the penalty shall be given to the prosecutor, and the other half to the king; but if the prosecution is commenced after six months after the offence, the whole penalty shall go to the king. The justice may mitigate the penalty to one moiety, to be paid together with the costs. And upon nonpayment of the penalty and

foreſt, park, chaſe, or warren. For unqualified perſons tranſgreſſing theſe laws, by killing game, keeping engines for that purpoſe, or even having game in their cuſtody, or for perſons (however qualified) that kill game, or have it in poſſeſſion, at unſeaſonable times of the year, or unſeaſonable hours of the day or night, on ſundays or on Chriſtmas day, there are various penalties aſſigned, corporal and pecuniary, by different ſtatutes [k]; on any of which, but only on one at a time, the juſtices may convict in a ſummary way, or (in moſt of them) proſecutions may be carried on at the aſſiſes. And, laſtly, by ſtatute 28 Geo. II. c. 12. no perſon, however qualified to *kill*, may make merchandize of this valuable privilege, by *ſelling* or expoſing to ſale any game, on pain of like forfeiture as if he had no qualification (14).

[k] Burn's Juſtice, tit. Game.

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and coſts the party may be impriſoned three months. But upon giving ſecurity for the payment of theſe, he may appeal from the conviction to the next quarter ſeſſions.

(14) But a perſon qualified to kill, is not ſubject to any penalty for buying game.

CHAPTER THE FOURTEENTH.

OF HOMICIDE.

IN the ten preceding chapters we have conſidered, firſt, ſuch crimes and miſdemeſnors as are more immediately injurious to God and his holy religion; ſecondly, ſuch as violate or tranſgreſs the law of nations; thirdly, ſuch as more eſpecially affect the king, the father and repreſentative of his people; fourthly, ſuch as more directly infringe the rights of the public or commonwealth, taken in it's collective capacity; and are now, laſtly, to take into conſideration thoſe which in a more peculiar manner affect and injure *individuals* or private ſubjects.

WERE theſe injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall abſolutely under the notion of private wrongs; for which a ſatisfaction would be due only to the party injured: the manner of obtaining which was the ſubject of our inquiries in the preceding volume. But the wrongs, which we are now to treat of, are of a much more extenſive conſequence; 1. Becauſe it is impoſſible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Becauſe they include in them almoſt always a breach of the public peace: 3. Becauſe by their example and evil tendency they threaten and endanger the ſubverſion of all civil ſociety. Upon theſe accounts it is, that, beſides the private ſatisfaction due and given in many [177]
caſes

cafes to the individual, by action for the private wrong, the government alfo calls upon the offender to fubmit to public punifhment for the public crime. And the profecution of thefe offences is always at the fuit and in the name of the king, in whom by the texture of our conftitution the *jus gladii*, or executory power of the law, entirely refides. Thus too, in the old Gothic conftitution, there was a threefold punifhment inflicted on all delinquents: firft, for the private wrong to the party injured; fecondly, for the offence againft the king by difobedience to the laws; and thirdly, for the crime againft the public by their evil example [a]. Of which we may trace the groundwork, in what Tacitus tells us of his Germans [b]; that, whenever offenders were fined, "*pars* "*mulctae regi, vel civitati, pars ipfi qui vindicatur vel propin-*"*quis ejus, exfolvitur.*"

THESE crimes and mifdemefnors againft private fubjects are principally of three kinds; againft their *perfons*, their *habitations*, and their *property*.

OF crimes injurious to the *perfons* of private fubjects, the moft principal and important is the offence of taking away that life, which is the immediate gift of the great Creator; and of which therefore no man can be entitled to deprive himfelf or another, but in fome manner either expreffly commanded in, or evidently deducible from, thofe laws which the Creator has given us; the divine laws, I mean, of either nature or revelation. The fubject therefore of the prefent chapter will be the offence of *homicide* or deftroying the life of man, in it's feveral ftages of guilt, arifing from the particular circumftances of mitigation or aggravation which attend it.

Now homicide, or the killing of any human creature, is of three kinds; *juftifiable*, *excufable*, and *felonious*. The firft has no fhare of guilt at all; the fecond very little; but the

[a] Stiernhook, *l.* 1. *c.* 5. [b] *de mor. Germ. c.* 12.

third

third is the higheſt crime againſt the law of nature that man is capable of committing.

I. JUSTIFIABLE homicide is of divers kinds.

1. SUCH as is owing to ſome unavoidable *neceſſity*, without any will, intention, or deſire, and without any inadvertence or negligence, in the party killing, and therefore without any ſhadow of blame. As, for inſtance, by virtue of ſuch an office as obliges one, in the execution of public juſtice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. This is an act of neceſſity, and even of civil duty; and therefore not only juſtifiable, but commendable, where the law requires it. But the law muſt *require* it, otherwiſe it is not juſtifiable: therefore wantonly to kill the greateſt of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder [c]. For as Bracton [d] very juſtly obſerves, "*iſtud homicidium ſi fit ex livore, vel delectatione* "*effundendi humanum ſanguinem, licet juſte occidatur iſte, tamen* "*occiſor peccat mortaliter, propter intentionem corruptam.*" And farther, if judgment of death be given by a judge not authorized by lawful commiſſion, and execution is done accordingly, the judge is guilty of murder [e]. And upon this account ſir Matthew Hale himſelf, though he accepted the place of a judge of the common pleas under Cromwell's government, (ſince it is neceſſary to decide the diſputes of civil property in the worſt of times,) yet declined to ſit on the crown ſide at the aſſiſes, and try priſoners; having very ſtrong objections to the legality of the uſurper's commiſſion [f]: a diſtinction perhaps rather too refined; ſince the puniſhment of crimes is at leaſt as neceſſary to ſociety, as maintaining the boundaries of property. Alſo ſuch judgment, when legal, muſt be executed by the proper officer, or his appointed deputy; for no one elſe is *required* by law to do it, which requiſition it is, that juſtifies the homicide. If another

[c] 1 Hal. P. C. 497.
[d] *fol.* 120.
[e] 1 Hawk. P. C. 70. 1 Hal. P. C. 497.
[f] Burnet in his life.

perſon doth it of his own head, it is held to be murder[g]: even though it be the judge himſelf[h]. It muſt farther be executed, *ſervato juris ordine*; it muſt purſue the ſentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice verſa*, it is murder[i]: for he is merely miniſterial, and therefore only juſtified when he acts under the authority and compulſion of the law: but, if a ſheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commiſſion of homicide, and beſides, this licence might occaſion a very groſs abuſe of his power. The king indeed may remit part of a ſentence; as, in the caſe of treaſon, all but the beheading: but this is no change, no introduction of a new puniſhment; and in the caſe of felony, where the judgment is *to be hanged*, the king (it hath been ſaid) cannot legally order even a peer to be beheaded[k]. But this doctrine will be more fully conſidered in a ſubſequent chapter.

Again; in ſome caſes homicide is juſtifiable, rather by the *permiſſion*, than by the abſolute *command*, of the law: either for the *advancement* of public *juſtice*, which without ſuch indemnification would never be carried on with proper vigour; or, in ſuch inſtances where it is committed for the *prevention* of ſome atrocious *crime*, which cannot otherwiſe be avoided.

2. Homicide, committed for the *advancement* of public *juſtice*, are; 1. Where an officer, in the execution of his office, either in a civil or criminal caſe, kills a perſon that aſſaults and reſiſts him[l]. 2. If an officer, or any private perſon, attempts to take a man charged with felony, and is reſiſted; and, in the endeavour to take him, kills him[m]. This is ſimilar to the old Gothic conſtitutions, which

[g] 1 Hal. P. C. 501. 1 Hawk. P. C. 70.
[h] Dalt. Juſt. c. 150.
[i] Finch. L. 31. 3 Inſt. 52. 1 Hal. P. C. 501.
[k] 3 Inſt. 52. 212.
[l] 1 Hal. P. C. 494. 1 Hawk. P. C. 71.
[m] 1 Hal. P. C. 494.

(Stiernhook

(Stiernhook informs us [n]) "*furem, ſi aliter capi non poſſet, occidere permittunt.*" 3. In caſe of a riot, or rebellious [180] aſſembly, the officers endeavouring to diſperſe the mob are juſtifiable in killing them, both at common law [o], and by the riot act, 1 Geo. I. c. 5. 4. Where the priſoners in a gaol, or going to gaol, aſſault the gaoler or officer, and he in his defence kills any of them, it is juſtifiable, for the ſake of preventing an eſcape [p]. 5. If treſpaſſers in foreſts, parks, chaſes, or warrens, will not ſurrender themſelves to the keepers, they may be ſlain; by virtue of the ſtatute 21 Edw. I. ſt. 2. *de malefactoribus in parcis*, and 3 & 4 W. & M. c. 10. But, in all theſe caſes, there muſt be an apparent neceſſity on the officer's ſide; *viz.* that the party could not be arreſted or apprehended, the riot could not be ſuppreſſed, the priſoners could not be kept in hold, the deer-ſtealers could not but eſcape, unleſs ſuch homicide were committed: otherwiſe, without ſuch abſolute neceſſity, it is not juſtifiable. 6. If the champions in a trial by battle killed either of them the other, ſuch homicide was juſtifiable, and was imputed to the juſt judgment of God, who was thereby preſumed to have decided in favour of the truth [q].

3. IN the next place, ſuch homicide as is committed for the *prevention* of any forcible and atrocious *crime*, is juſtifiable by the law of nature [r]; and alſo by the law of England, as it ſtood ſo early as the time of Bracton [s], and as it is ſince declared in ſtatute 24 Hen. VIII. c. 5. If any perſon attempts a robbery or murder of another, or attempts to break open a houſe *in the night time*, (which extends alſo to an attempt to burn it [t],) and ſhall be killed in ſuch attempt, the ſlayer ſhall be acquitted and diſcharged. This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any houſe *in the day time*, unleſs it carries with it an attempt of robbery alſo.

[n] *de jure Goth. l.* 3. *c.* 5.
[o] 1 Hal. P. C. 495. 1 Hawk. P. C. 161.
[p] 1 Hal. P. C. 496.
[q] 1 Hawk. P. C. 71.
[r] Puff. L. of N. l. 2. c. 5.
[s] *fol.* 155.
[t] 1 Hal. P. C. 488.

So the Jewish law, which punished no theft with death, makes homicide only justifiable, in case of *nocturnal* house-breaking; "if a thief be found breaking up, and he be
[181] "smitten that he die, no blood shall be shed for him: but "if the sun be risen upon him, there shall blood be shed for "him; for he should have made full restitution [u]." At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact [w]: and, by the Roman law of the twelve tables, a thief might be slain by night with impunity; or even by day, if he armed himself with any dangerous weapon [x]: which amounts very nearly to the same as is permitted by our own constitutions.

THE Roman law also justifies homicide, when committed in defence of the chastity either of one's self or relations [y]: and so also, according to Selden [z], stood the law in the Jewish republic. The English law likewise justifies a woman, killing one who attempts to ravish her [a]: and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other [b]. And I make no doubt but the forcibly attempting a crime of a still more detestable nature, may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own, and all other laws, seems to be this; that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we must not carry this doctrine to the same visionary length that Mr. Locke does; who holds [c], "that all "manner of force without right upon a man's person, puts "him in a state of war with the aggressor; and, of conse-"quence, that, being in such a state of war, he may law-

[u] Exod. xxii. 2.
[w] Potter. Antiq. b. 1. c. 24.
[x] Cic. *pro Milone*, 3. *Ff.* 9. 2. 4.
[y] "*Divus Hadrianus rescripsit, eum "qui stuprum sibi vel suis inferentem osci-dit, dimittendum.*" (*Ff.* 48. 8. 1.)
[z] *de legib. Hebræor. l.* 4. *c.* 3.
[a] Bac. Elem. 34. 1 Hawk. P. C. 71.
[b] 1 Hal. P. C. 485, 486.
[c] Ess. on gov. p. 2. c. 5.

"fully

'fully kill him that puts him under this unnatural reſtraint." However juſt this concluſion may be in a ſtate of uncivilized nature, yet the law of England, like that of every other well-regulated community, is too tender of the public peace, [182] too careful of the lives of the ſubjects, to adopt ſo contentious a ſyſtem; nor will ſuffer with impunity any crime to be *prevented* by death, unleſs the ſame, if committed, would alſo be *puniſhed* by death.

IN theſe inſtances of *juſtifiable* homicide, it may be obſerved that the ſlayer is in no kind of fault whatſoever, not even in the minuteſt degree; and is therefore to be totally acquitted and diſcharged, with commendation rather than blame. But that is not quite the caſe in *excuſable* homicide, the very name whereof imports ſome fault, ſome error, or omiſſion; ſo trivial however, that the law excuſes it from the guilt of felony, though in ſtrictneſs it judges it deſerving of ſome little degree of puniſhment.

II. EXCUSABLE homicide is of two ſorts; either *per infortunium*, by miſadventure; or *ſe defendendo*, upon a principle of ſelf-preſervation. We will firſt ſee wherein theſe two ſpecies of homicide are diſtinct, and then wherein they agree.

1. HOMICIDE *per infortunium* or *miſadventure*, is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a ſtander-by; or where a perſon qualified to keep a gun, is ſhooting at a mark, and undeſignedly kills a man[d]: for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a maſter his apprentice or ſcholar, or an officer puniſhing a criminal, and happens to occaſion his death, it is only miſadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the inſtrument, or the quan-

[d] 1 Hawk. P. C. 73, 74.

tity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder[e]; for the act of immoderate correction is unlawful.
[183] Thus by an edict of the emperor Constantine[f], when the rigour of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and, if death accidentally ensued, he was guilty of no crime: but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet grosser manner "*immoderate suo jure utatur, tunc* "*reus homicidii sit.*"

BUT, to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and swordplaying, the succeeding amusement of their posterity: and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony of manslaughter. But, if the king command, or permit such diversion, it is said to be only misadventure; for then the act is lawful[g]. In like manner as, by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games, authorized or permitted by the state, was not held to be guilty of homicide[h]. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful: but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence[i]. And in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts[k].

2. HOMICIDE in *self-defence*, or *se defendendo*, upon a sudden affray, is also excusable rather than justifiable, by the

[e] 1 Hal. P. C. 473, 474.
[f] *Cod. l.* 9. *t.* 14.
[g] 1 Hal. P. C. 473. 1 Hawk. P. C. 74.
[h] Plato, *de LL. lib.* 7. *Ef.* 9. 2. 7.
[i] Hawk. P. C. 73.
[k] *Ibid.* 74. 1 Hal. P. C. 472. Foft. 261.

English

Engliſh law. This ſpecies of ſelf-defence muſt be diſtinguiſhed from that juſt now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only a matter of excuſe, but of juſtification. But the ſelf-defence, [184] which we are now ſpeaking of, is that whereby a man may protect himſelf from an aſſault, or the like, in the courſe of a ſudden brawl or quarrel, by killing him who aſſaults him. And this is what the law expreſſes by the word *chance-medley*, or (as ſome rather chooſe to write it) *chaud-medley*; the former of which in it's etymology ſignifies a *caſual* affray, the latter an affray in the *heat* of blood or paſſion; both of them of pretty much the ſame import: but the former is in common ſpeech too often erroneouſly applied to any manner of homicide by miſadventure; whereas it appears by the ſtatute 24 Hen. VIII. c. 5. and our antient books [l], that it is properly applied to ſuch killing as happens in ſelf-defence upon a ſudden rencounter [m]. This right of natural defence does not imply a right of attacking: for, inſtead of attacking one another for injuries paſt or impending, men need only have recourſe to the proper tribunals of juſtice. They cannot therefore legally exerciſe this right of preventive defence, but in ſudden and violent caſes when certain and immediate ſuffering would be the conſequence of waiting for the aſſiſtance of the law. Wherefore to excuſe homicide by the plea of ſelf-defence, it muſt appear that the ſlayer had no other poſſible (or, at leaſt, probable) means of eſcaping from his aſſailant.

IT is frequently difficult to diſtinguiſh this ſpecies of homicide (upon *chance-medley* in ſelf-defence) from that of manſlaughter, in the proper, legal ſenſe of the word [n]. But the true criterion between them ſeems to be this: when both parties are actually combating at the time when the mortal ſtroke is given, the ſlayer is then guilty of manſlaughter; but if the ſlayer hath not begun to fight, or (having begun) endeavours to decline any farther ſtruggle, and afterwards,

[l] Staunf. P. C. 16.
[m] 3 Inſt. 55. 57. Foſt. 275, 276.
[n] 3 Inſt. 55.

being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence [o]. For which reason the law requires, that the person, who kills another in his own defence, should have retreated as far as he [185] conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects the law countenances no such point of honour: because the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves [p]. In this the civil law also agrees with ours, or perhaps goes rather farther; "*qui cum aliter tueri se non possunt, damni culpam* "*dederint, innoxii sunt* [q]." The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him [r]: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice [s], as well as of the municipal law.

AND, as the *manner* of the defence, so is also the *time* to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design [t]. But if A upon a sudden quarrel assaults B first, and

[o] Foft. 277.
[p] 1 Hal. P. C. 481. 483.
[q] *Ff.* 9. 2. 45.
[r] 1 Hal. P. C. 483.
[s] Puff. b. 2. c. 5. § 13.
[t] 1 Hal. P. C. 479.

upon

upon B's returning the assault, A really and *bona fide* flees; and, being driven to the wall, turns again upon B and kills him, this may be *se defendendo* according to some of our writers [u]: though others [w] have thought this opinion too favourable; [186] inasmuch as the necessity, to which he is at last reduced, originally arose from his own fault. Under this excuse, of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself [x].

There is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death: and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferable to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by lord Bacon [y], where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's, is excusable through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life.

Let us next take a view of those circumstances wherein these two species of homicide, by misadventure and self-defence, agree; and those are in their blame and punishment. For the law sets so high a value upon the life of a man, that it always intends some misbehaviour in the person who takes it away, unless by the command or express permission of the law. In the case of misadventure, it presumes negligence, or

[u] 1 Hal. P. C. 482.
[w] 1 Hawk. P. C. 73.
[x] 1 Hal. P. C. 484.
[y] Elem. c. 5. See also 1 Hawk. P. C. 73.

at leaſt a want of ſufficient caution in him who was ſo unfortunate as to commit it; who therefore is not altogether faultleſs [z]. And as to the neceſſity which excuſes a man
[187] who kills another *ſe defendendo*, lord Bacon [a] entitles it *neceſſitas culpabilis*, and thereby diſtinguiſhes it from the former neceſſity of killing a thief or a malefactor. For the law intends that the quarrel or aſſault aroſe from ſome unknown wrong, or ſome provocation, either in word or deed: and ſince in quarrels both parties may be, and uſually are, in ſome fault; and it ſcarce can be tried who was originally in the wrong; the law will not hold the ſurvivor entirely guiltleſs. But it is clear, in the other caſe, that where I kill a thief that breaks into my houſe, the original default can never be upon my ſide. The law beſides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining, that he who ſlays his neighbour, without an expreſs warrant from the law ſo to do, ſhall in no caſe be abſolutely free from guilt.

NOR is the law of England ſingular in this reſpect. Even the ſlaughter of enemies required a ſolemn purgation among the Jews; which implies that the death of a man, however it happens, will leave ſome ſtain behind it. And the moſaical law [b] appointed certain cities of refuge for him "who "killed his neighbour unawares: as if a man goeth into "the wood with his neighbour to hew wood, and his hand "fetcheth a ſtroke with the ax to cut down a tree, and the "head ſlippeth from the helve, and lighteth upon his neigh-"bour that he die, he ſhall flee unto one of theſe cities and "live." But it ſeems he was not held wholly blameleſs, any more than in the Engliſh law; ſince the avenger of blood might ſlay him before he reached his aſylum, or if he afterwards ſtirred out of it till the death of the high prieſt. In the imperial law likewiſe [c] caſual homicide was excuſed, by

[z] 1 Hawk. P. C. 72.
[a] Elem. c. 5.
[b] Numb. c. 35. and Deut. c. 19.
[c] *Cod.* 9. 16. 5.

the

the indulgence of the emperor ſigned with his own ſign manual, "*annotatione principis:*" otherwiſe the death of a man, however committed, was in ſome degree puniſhable. Among the Greeks [d] homicide by misfortune was expiated by voluntary baniſhment for a year [e]. In Saxony a fine is [188] paid to the kindred of the ſlain; which alſo, among the Weſtern Goths, was little inferior to that of voluntary homicide [f]: and in [g] France no perſon is ever abſolved in caſes of this natnre, without a largeſs to the poor, and the charge of certain maſſes for the ſoul of the party killed.

THE penalty inflicted by our laws is ſaid by ſir Edward Coke to have been antiently no leſs than death [h]; which however is with reaſon denied by later and more accurate writers [i]. It ſeems rather to have conſiſted in a forfeiture, ſome ſay of all the goods and chattels, others of only part of them, by way of fine or *weregild* [k]: which was probably diſpoſed of, as in France, *in pios uſus*, according to the humane ſuperſtition of the times, for the benefit of *his* ſoul who was thus ſuddenly ſent to his account, with all his imperfections on his head. But that reaſon having long ceaſed, and the penalty (eſpecially if a total forfeiture) growing more ſevere than was intended, in proportion as perſonal property has become more conſiderable, the delinquent has now, and has had as early as our records will reach [l], a pardon and writ of reſtitution of his goods as a matter of courſe and right, only paying for ſuing out the ſame [m]. And indeed to prevent this expence, in caſes where the death has notoriouſly happened by miſadventure

[d] Plato, *de Leg. lib.* 9.

[e] To this expiation by baniſhment the ſpirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty-third iliad, that when a child, he was obliged to flee his country for caſually killing his playfellow; "νηπιος ωϛ ἐθελων."

[f] Stiernh. *de jure Goth. l.* 3. *c.* 4.

[g] De Morney, on the digeſt.

[h] 2 Inſt. 148. 315.

[i] 1 Hal. P. C. 425. 1 Hawk. P. C. 75. Foſt. 282, &c.

[k] Foſt. 287.

[l] Foſt. 283.

[m] 2 Hawk. P. C. 381.

or in self-defence, the judges will usually permit (if not direct) a general verdict of acquittal [n] (1).

III. FELONIOUS homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

[189] SELF-MURDER, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law [o], yet was punished by the Athenian law with cutting off the hand which committed the desperate deed [p]. And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder [q]. A *felo de se* therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if attempting to kill another, he runs upon his antagonist's sword: or, shooting

[n] Fost. 288.

[o] "*Si quis impatientia doloris, aut "taedio vitae, aut morbo, aut furore, "aut pudore, mori maluit, non animadvertatur in eum.*" *Ff.* 49. 16. 6.

[p] Pott. Antiq. b. 1. c. 26.

[q] Keilw. 136.

(1) Where the homicide does not amount to murder or manslaughter, it is now the universal practice to direct an acquittal.

at

at another, the gun burſts and kills himſelf[r]. The party muſt be of years of diſcretion, and in his ſenſes, elſe it is no crime. But this excuſe ought not to be ſtrained to that length, to which our coroner's juries are apt to carry it, *viz.* that the very act of ſuicide is an evidence of inſanity; as if every man, who acts contrary to reaſon, had no reaſon at all: for the ſame argument would prove every other criminal *non compos*, as well as the ſelf-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of diſcerning right from wrong; which is neceſſary, as was obſerved in a former chapter[f], to form a legal excuſe. And therefore if a real [190] lunatic kills himſelf in a lucid interval, he is a *felo de ſe* as much as another man[s].

BUT now the queſtion follows, what puniſhment can human laws inflict on one who has withdrawn himſelf from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former, by an ignominious burial in the highway, with a ſtake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be ſome motive to reſtrain him from ſo deſperate and wicked an act. And it is obſervable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cauſe of his death. As if huſband and wife be poſſeſſed jointly of a term of years in land, and the huſband drowns himſelf; the land ſhall be forfeited to the king, and the wife ſhall not have it by ſurvivorſhip. For by the act of caſting himſelf into the water he forfeits the term; which gives a title to the king, prior to the wife's title by ſurvivorſhip, which could not accrue till the inſtant of her huſband's death[t]. And though it muſt be owned that the letter of the law herein borders a little upon ſeverity, yet it is ſome alle-

[r] 1 Hawk. P. C. 68. 1 Hal. P. C. 413.
[f] See pag. 24.
[s] 1 Hal. P. C. 412.
[t] Finch. L. 216.

viation

viation that the power of mitigation is left in the breaſt of the ſovereign, who upon this (as on all other occaſions) is reminded by the oath of his office to execute judgment in mercy.

THE other ſpecies of criminal homicide is that of killing another man. But in this there are alſo degrees of guilt, which divide the offence into *manſlaughter* and *murder*. The difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally conſiſts in this, that manſlaughter (when voluntary) ariſes from the ſudden heat of the paſſions, murder from the wickedneſs of the heart.

[191] I. MANSLAUGHTER is therefore thus defined [u], the unlawful killing of another, without malice either expreſs or implied: which may be either voluntarily, upon a ſudden heat; or involuntarily, but in the commiſſion of ſome unlawful act. Theſe were called in the Gothic conſtitutions "*homicidia vulgaria; quae aut caſu, aut etiam ſponte commit-*" "*tuntur, ſed in ſubitaneo quodam iracundiae calore et impetu*" [w]." And hence it follows, that in manſlaughter there can be no acceſſaries before the fact; becauſe it muſt be done without premeditation.

As to the firſt, or *voluntary* branch: if upon a ſudden quarrel two perſons fight, and one of them kills the other, this is manſlaughter: and ſo it is, if they upon ſuch an occaſion go out and fight in a field; for this is one continued act of paſſion [x]: and the law pays that regard to human frailty, as not to put a haſty and deliberate act upon the ſame footing with regard to guilt. So alſo if a man be greatly provoked, as by pulling his noſe, or other great indignity, and immediately kills the aggreſſor, though this is not excuſable *ſe defendendo*, ſince there is no abſolute neceſſity for doing it to

[u] 1 Hal. P. C. 466.
[w] Stiern. *de jure Goth. l.* 3. *c.* 4.
[x] 1 Hawk. P. C. 82.

preſerve himſelf; yet neither is it murder, for there is no previous malice; but it is manſlaughter [y]. But in this, and in every other caſe of homicide, upon provocation, if there be a ſufficient cooling-time for paſſion to ſubſide and reaſon to interpoſe, and the perſon ſo provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder [z]. So if a man takes another in the act of adultery with his wife, and kills him directly upon the ſpot; though this was allowed by the laws of Solon [a], as likewiſe by the Roman civil law, (if the adulterer was found in the huſband's own houſe [b],) and alſo among the antient Goths [c]; yet in England it is not abſolutely ranked in the claſs of juſtifiable homicide, as in caſe of a forcible rape, but it is manſlaughter [d]. It is however the [192] loweſt degree of it; and therefore in ſuch a caſe the court directed the burning in the hand to be gently inflicted, becauſe there could not be a greater provocation [e]. Manſlaughter therefore on a ſudden provocation differs from excuſable homicide *ſe defendendo* in this: that in one caſe there is an apparent neceſſity, for ſelf-preſervation, to kill the aggreſſor; in the other no neceſſity at all, being only a ſudden act of revenge.

THE ſecond branch, or *involuntary* manſlaughter, differs alſo from homicide excuſable by miſadventure, in this; that miſadventure always happens in conſequence of a lawful act, but this ſpecies of manſlaughter in conſequence of an unlawful one. As if two perſons play at ſword and buckler, unleſs by the king's command, and one of them kills the other; this is manſlaughter, becauſe the original act was unlawful, but it is not murder, for the one had no intent to do the other any perſonal miſchief [f]. So where a perſon does an act, lawful in itſelf, but in an unlawful manner, and without due caution and circumſpection: as when a

[y] Kelyng. 135.
[z] Foſt. 296.
[a] Plutarch. *in vit. Solon.*
[b] *Ff.* 48. 5. 24.
[c] Stiernh. *de jure Goth. l.* 3. *c.* 2.
[d] 1 Hal. P. C. 486.
[e] Sir T. Raym. 212.
[f] 3 Inſt. 56.

workman

workman flings down a ſtone or piece of timber into the ſtreet, and kills a man; this may be either miſadventure, manſlaughter, or murder, according to the circumſtances under which the original act was done: if it were in a country village, where few paſſengers are, and he calls out to all people to have a care, it is miſadventure only; but if it were in London, or other populous town, where people are continually paſſing, it is manſlaughter, though he gives loud warning [g]; and murder, if he knows of their paſſing, and gives no warning at all, for then it is malice againſt all mankind [h]. And, in general, when an involuntary killing happens in conſequence of an unlawful act, it will be either murder or manſlaughter [i] according to the nature of the act which occaſioned it. If it be in proſecution of a
193] felonious intent, or in it's conſequences naturally tended to bloodſhed, it will be murder; but, if no more was intended than a mere civil treſpaſs, it will only amount to manſlaughter [j].

NEXT, as to the *puniſhment* of this degree of homicide: the crime of manſlaughter amounts to felony, but within the benefit of clergy; and the offender ſhall be burnt in the hand, and forfeit all his goods and chattels (2).

BUT there is one ſpecies of manſlaughter, which is puniſhed as murder, the benefit of clergy being taken away

[g] Kel. 40.

[h] 3 Inſt. 57.

[i] Our ſtatute law has ſeverely animadverted on one ſpecies of criminal negligence, whereby the death of a man is occaſioned. For by ſtatute 10 Geo. II. c. 31. if any waterman between Graveſend and Windſor receives into his boat or barge a greater number of perſons than the act allows, and any paſſenger ſhall then be drowned, ſuch waterman is guilty (not of manſlaughter, but) of felony, and ſhall be tranſported as a felon.

[j] Foſter. 258. 1 Hawk. P. C. 84.

(2) By the 19 Geo. III. c. 74. inſtead of burning in the hand, the court may, if they think fit, impoſe a moderate pecuniary fine, and this fine ſhall have the ſame legal effect and conſequences as burning in the hand.

from it by ſtatute; namely, the offence of mortally *ſtabbing* another, though done upon ſudden provocation. For by ſtatute 1 Jac. I. c. 8. when one thruſts or ſtabs another, not then having a weapon drawn, or who hath not then firſt ſtricken the party ſtabbing, ſo that he dies thereof within ſix months after, the offender ſhall not have the benefit of clergy, though he did it not of malice aforethought. This ſtatute was made on account of the frequent quarrels and ſtabbings with ſhort daggers, between the Scotch and the Engliſh, at the acceſſion of James the firſt [k], and, being therefore of a temporary nature, ought to have expired with the miſchief which it meant to remedy. For, in point of ſolid and ſubſtantial juſtice, it cannot be ſaid that the mode of killing, whether by ſtabbing, ſtrangling, or ſhooting, can either extenuate or enhance the guilt: unleſs where, as in the caſe of poiſoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath conſtrued the ſtatute ſo favourably in behalf of the ſubject, and ſo ſtrictly when againſt him, that the offence of ſtabbing now ſtands almoſt upon the ſame footing, as it did at the common law [l]. Thus, (not to repeat the caſes before-mentioned, of ſtabbing an adultereſs, *&c.* which are barely manſlaughter, as at common law,) in the conſtruction of this ſtatute it hath been doubted, whether, if the deceaſed had ſtruck at all before the mortal blow given, this does not take it out of the ſtatute, though in the preceding quarrel the ſtabber had given the firſt blow; and it ſeems to be the better opinion, that this is not within the ſtatute [m]. Alſo it hath been reſolved, that the killing a man by throwing a hammer or other blunt weapon is not within [194] the ſtatute; and whether a ſhot with a piſtol be ſo or not, is doubted [n]. But if the party ſlain had a cudgel in his hand, or had thrown a pot or a bottle, or diſcharged a piſtol at the party ſtabbing, this is a ſufficient having a weapon drawn on his ſide within the words of the ſtatute [o].

[k] Lord Raym. 140.
[l] Foſt. 299, 300.
[m] Foſt. 301. 1 Hawk. P. C. 77.
[n] 1 Hal. P. C. 470.
[o] 1 Hawk. P. C. 77.

2. We

2. WE are next to consider the crime of deliberate and wilful *murder*; a crime at which human nature starts, and which is I believe punished almost universally throughout the world with death. The words of the mosaical law (over and above the general precept to Noah[p], that "whoso sheddeth "man's blood, by man shall his blood be shed") are very emphatical in prohibiting the pardon of murderers[q], "Moreover ye shall take no satisfaction for the life of a murderer, who is guilty of death, but he shall surely be put to "death; for the land cannot be cleansed of the blood that "is shed therein, but by the blood of him that shed it." And therefore our law has provided one course of prosecution, (that by appeal, of which hereafter,) wherein the king himself is excluded the power of pardoning murder: so that, were the king of England so inclined, he could not imitate that Polish monarch mentioned by Puffendorf[r]: who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, "*nos, divini juris* "*rigorem moderantes, &c.*" But let us now consider the definition of this great offence.

THE name of *murder* (as a crime) was antiently applied only to the secret killing of another[s]; (which the word *moerda*, signifies in the Teutonic language[t];) and it was defined, "*homicidium quod nullo vidente, nullo sciente, clam* "*perpetratur*[u]:" for which the vill wherein it was com-
[195] mitted, or (if that were too poor) the whole hundred was liable to a heavy amercement; which amercement itself was also denominated *murdrum*[w]. This was an antient usage among the Goths in Sweden and Denmark; who

[p] Gen. ix. 6.

[q] Numb. xxxv. 31.

[r] L. of N. b. 8. c. 3.

[s] *Dial. de Scacch. l.* 1. *c.* 10.

[t] Stiernh. *de jure Sueon. l.* 3. *c.* 3. The word *murdre* in our old statutes also signified any kind of concealment or stifling. So in the statute of Exeter, 14 Edw. I. "*je riens ne celerai, ne suf-* "*ferai estre celé ne murdré:*" which is thus translated in Fleta, *l.* 1. *c.* 18. § 4. "*Nullam veritatem celabo, nec celari per-* "*mittam nec murdrari.*" And the words "*par murdre le droit*" in the articles of that statute, are rendered in Fleta *ibid.* § 8. "*pro jure alicujus murdriendo.*"

[u] Glanv. *l.* 14. *c.* 3.

[w] Bract. *l.* 3. *tr.* 2. *c.* 15. § 7. Stat. Marlb. *c.* 26. Fost. 281.

suppose

ſuppoſed the neighbourhood, unleſs they produced the murderer, to have perpetrated or at leaſt connived at the murder[x]: and, according to Bracton[y], was introduced into this kingdom by king Canute, to prevent his countrymen the Danes from being privily murdered by the Engliſh; and was afterwards continued by William the conqueror, for the like ſecurity to his own Normans[z]. And therefore if, upon inquiſition had, it appeared that the perſon found ſlain was an Engliſhman, (the preſentment whereof was denominated *engleſcherie*[a],) the country ſeems to have been excuſed from this burthen. But, this difference being totally aboliſhed by ſtatute 14 Edw. III. c. 4. we muſt now (as is obſerved by Staunforde[b]) define murder in quite another manner, without regarding whether the party ſlain was killed openly or ſecretly, or whether he was of Engliſh or foreign extraction.

MURDER is therefore now thus defined, or rather deſcribed, by ſir Edward Coke[c]; "when a perſon, of ſound "memory and diſcretion, unlawfully killeth any reaſonable "creature in being, and under the king's peace, with malice "aforethought, either expreſs or implied." The beſt way of examining the nature of this crime will be by conſidering the ſeveral branches of this definition.

FIRST, it muſt be committed by *a perſon of ſound memory and diſcretion*: for lunatics or infants, as was formerly obſerved, are incapable of committing any crime: unleſs in ſuch caſes where they ſhew a conſciouſneſs of doing wrong, and of courſe a diſcretion, or diſcernment, between good and evil.

NEXT, it happens when a perſon of ſuch ſound diſcretion *unlawfully killeth*. The unlawfulneſs ariſes from the killing without warrant or excuſe: and there muſt alſo be an actual [196]

[x] Stiernh. *l.* 3. *c* 4.
[y] *l.* 3. *tr.* 2. *c.* 15.
[z] 1 Hal. P. C. 447.
[a] Bract. *ubi ſupr.*
[b] P. C. *l.* 1. *c.* 10.
[c] 3 Inſt. 47.

killing to conſtitute murder: for a bare aſſault, with intent to kill, is only a great miſdemeſnor, though formerly it was held to be murder[d]. The killing may be by poiſoning ſtriking, ſtarving, drowning, and a thouſand other forms of death, by which human nature may be overcome. And if a perſon be indicted for one ſpecies of killing, as by *poiſoning*, he cannot be convicted by evidence of a totally different ſpecies of death, as by *ſhooting* with a piſtol or *ſtarving*. But where they only differ in circumſtance, as if a *wound* be alleged to be given with a ſword, and it proves to have ariſen from a ſtaff, an axe, or a hatchet, this difference is immaterial[e]. Of all ſpecies of deaths, the moſt deteſtable is that of poiſon; becauſe it can of all others be the leaſt prevented either by manhood or forethought[f]. And therefore by the ſtatute 22 Hen. VIII. c. 9. it was made treaſon, and a more grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death (3): but this act did not live long, being repealed by 1 Edw. VI. c. 12. There was alſo, by the antient common law, one ſpecies of killing held to be murder, which may be dubious at this day; as there hath not been an inſtance wherein it has been held to be murder for many ages paſt[g]: I mean by

[d] 1 Hal. P. C. 425.
[e] 3 Inſt. 319. 2 Hal. P. C. 185.
[f] 3 Inſt. 48.
[g] Foſt. 132. In the caſe of Macdaniel and Berry, reported by Sir Michael Foſter, though the then attorney general declined

(3) This extraordinary puniſhment ſeems to have been adopted by the legiſlature, from the peculiar circumſtances of the crime, which gave riſe to it; for the preamble of the ſtatute informs us, that John Roofe, a cook, had been lately convicted of throwing poiſon into a large pot of broth, prepared for the biſhop of Rocheſter's family, and for the poor of the pariſh; and the ſaid John Roofe was by a retroſpective clauſe of the ſame ſtatute ordered to be boiled to death. Lord Coke mentions ſeveral inſtances of perſons ſuffering this horrid puniſhment. 3 *Inſt.* 48. Murder of malice prepenſe, was made high treaſon in Ireland, by 10 Hen. VII. c. 21. *Iriſh Statutes.*

bearing

bearing falſe witneſs againſt another, with an expreſs premeditated deſign to take away his life, ſo as the innocent perſon be condemned and executed [h]. The Gothic laws puniſhed in this caſe, both the judge, the witneſſes, and the proſecutor; "*peculiari poena judicem puniunt; peculiari teſtes, "quorum fides judicem ſeduxit; peculiari denique et maxima "auctorem, ut homicidam*[i]." And, among the Romans, the *lex Cornelia, de ſicariis*, puniſhed the falſe witneſs with death, as being guilty of a ſpecies of aſſaſſination [k]. And there is no doubt but this is equally murder *in foro conſcientiae* as killing with a ſword; though the modern law (to avoid [197] the danger of deterring witneſſes from giving evidence upon capital proſecutions, if it muſt be at the peril of their own lives) has not yet puniſhed it as ſuch. If a man however does ſuch an act, of which the probable conſequence may be, and eventually is, death; ſuch killing may be murder, although no ſtroke be ſtruck by himſelf, and no killing may be primarily intended: as was the caſe of the unna-

declined to argue this point of law, I have good grounds to believe it was not from any apprehenſion of his that the point was not maintainable, but from other prudential reaſons. Nothing therefore ſhould be concluded from the waiving of that proſecution (4).

[h] Mirror. c. 1. § 9. Brit. c. 52. Bracton. *l.* 3. c. 4.

[i] Stiernh. *de jure Goth. l.* 3. *c.* 3.

[k] *Ff.* 48. 8. 1.

(4) The guilt of him who takes away the life of an innocent man by a falſe oath, is much more atrocious than that of an aſſaſſin, who murders by a dagger or by poiſon. He who deſtroys by perjury, adds to the privation of life public ignominy, the moſt excruciating of tortures to an honourable mind, and reduces an innocent family to ruin and infamy; but notwithſtanding this is the moſt horrid of all crimes, yet there is no modern authority to induce us to think that it is murder by the law of England: Lord Coke ſays expreſsly "it is not holden for murder at this day." 3 *Inſt.* 48. See alſo *Foſt.* 132. Such a diſtinction in perjury would be more dangerous to ſociety, and more repugnant to principles of ſound policy than in this inſtance the apparent want of ſeverity in the law. Few honeſt witneſſes would venture to give evidence againſt a priſoner tried for his life, if thereby they made themſelves liable to be proſecuted as murderers.

tural ſon, who expoſed his ſick father to the air, againſt his will, by reaſon whereof he died [l]; of the harlot, who laid her child under leaves in an orchard, where a kite ſtruck it and killed it [m]; and of the pariſh-officers, who ſhifted a child from pariſh to pariſh, till it died for want of care and ſuſtenance [n] (5). So too, if a man hath a beaſt that is uſed to do miſchief; and he, knowing it, *ſuffers* it to go abroad, and it kills a man; even this is manſlaughter in the owner: but if he had purpoſely *turned it looſe*, though barely to frighten people and make what is called ſport, it is with us (as in the Jewiſh law) as much murder, as if he had incited a bear or dog to worry them [o]. If a phyſician or ſurgeon gives his patient a potion or plaiſter to cure him, which contrary to expectation kills him, this is neither murder, nor manſlaughter, but miſadventure; and he ſhall not be puniſhed criminally, however liable he might formerly have been to a civil action for neglect or ignorance [p]: but it hath been holden, that if it be not a *regular* phyſician or ſurgeon, who adminiſters the medicine or performs the operation, it is manſlaughter at the leaſt [q]. Yet ſir Matthew Hale very juſtly queſtions the law of this determination [r]. In order alſo to make the killing murder, it is requiſite that the party die within a year and a day after the ſtroke received, or cauſe of death adminiſtered; in the computation of which, the whole day upon which the hurt was done ſhall be reckoned the firſt [s].

FARTHER; the perſon killed muſt be "*a reaſonable creature in being, and under the king's peace*," at the time of the

[l] 1 Hawk. P. C. 78.
[m] 1 Hal. P. C. 432.
[n] Palm. 545.
[o] *Ibid.* 431.
[p] Mirr. c. 4. § 16. See Vol. III. pag. 122.
[q] Britt. c. 5. 4 Inſt. 251.
[r] 1 Hal. P. C. 430.
[s] 1 Hawk. P. C. 79.

(5) Or if a maſter refuſes his apprentice neceſſary food or ſuſtenance, or treats him with ſuch continued harſhneſs and ſeverity as his death is occaſioned thereby, the law will imply malice, and the offence will be murder. *Leach.* 127.

killing.

killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the moſt regular-born Engliſhman; except he be an alien enemy in time of war [t]. To kill a child in it's mother's womb, is now no murder, but a great miſpriſion: but if the child be born alive, and dieth by reaſon of the potion or bruiſes it received in the womb, it ſeems, by the better opinion, to be murder in ſuch as adminiſtered or gave them [u]. But, as there is one caſe where it is difficult to prove the child's being born alive, namely, in the caſe of the murder of baſtard children by the unnatural mother, it is enacted by ſtatute 21 Jac. I. c. 27. that if any woman be delivered of a child which if born alive ſhould by law be a baſtard; and endeavours privately to conceal its death, by burying the child or the like; the mother ſo offending ſhall ſuffer death as in the caſe of murder, unleſs ſhe can prove by one witneſs at leaſt that the child was actually born dead. This law, which favours pretty ſtrongly of ſeverity, in making the concealment of the death almoſt concluſive evidence of the child's being murdered by the mother, is nevertheleſs to be alſo met with in the criminal codes of many other nations of Europe; as the Danes, the Swedes, and the French [v]: But I apprehend it has of late years been uſual with us in England, upon trials for this offence, to require ſome ſort of preſumptive evidence that the child was born alive, before the other conſtrained preſumption (that the child whoſe death is concealed, was therefore killed by its parent) is admitted to convict the priſoner.

LASTLY, the killing muſt be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now diſtinguiſhes murder from other killing: and this malice prepenſe, *malitia praecogitata*, is not ſo properly ſpite or malevolence to the deceaſed in particular, as any evil deſign in general: the dictate of a wicked, depraved,

[t] 3 Inſt. 50. 1 Hal. P. C. 433. but ſee 1 Hal. P. C. 433.
[u] 3 Inſt. 50. 1 Hawk. P. C. 80. [v] See Barrington on the ſtatutes, 425.

and malignant heart [w]; *un diſpoſition a faire un male choſe* [x]; and it may be either *expreſs* or *implied* in law. Expreſs
[199] malice is when one, with a ſedate deliberate mind and formed deſign, doth kill another: which formed deſign is evidenced by external circumſtances diſcovering that inward intention; as laying in wait, antecedent menaces, former grudges, and concerted ſchemes to do him ſome bodily harm [y]. This takes in the caſe of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their own lives and thoſe of their fellow-creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man; and therefore the law has juſtly fixed the crime and puniſhment of murder, on them, and on their ſeconds alſo [z]. Yet it requires ſuch a degree of paſſive valour to combat the dread of even undeſerved contempt, ariſing from the falſe notions of honour too generally received in Europe, that the ſtrongeſt prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy cuſtom; till a method be found out of compelling the original aggreſſor to make ſome other ſatisfaction to the affronted party, which the world ſhall eſteem equally reputable, as that which is now given at the hazard of the life and fortune, as well of the perſon inſulted, as of him who hath given the inſult. Alſo, if even upon a ſudden provocation one beats another in a cruel and unuſual manner, ſo that he dies, though he did not intend his death, yet he is guilty of murder by expreſs malice; that is, by an expreſs evil deſign, the genuine ſenſe of *malitia*. As when a park-keeper tied a boy, that was ſtealing wood, to a horſe's tail, and dragged him along the park; when a maſter corrected his ſervant with an iron bar; and a ſchoolmaſter ſtamped on his ſcholar's belly; ſo that each of the ſufferers died; theſe were juſtly held to be murders, becauſe

w Foſter. 256.
x 2 Roll. Rep. 461.
y 1 Hal. P. C. 451.
z 1 Hawk. P. C. 82.

the

the correction being exceſſive, and ſuch as could not proceed but from a bad heart, it was equivalent to a deliberate act of ſlaughter [a]. Neither ſhall he be guilty of a leſs crime, who kills another in conſequence of ſuch a wilful [200] act, as ſhews him to be an enemy to all mankind in general; as going deliberately, and with an intent to do miſchief [b], upon a horſe uſed to ſtrike, or coolly diſcharging a gun among a multitude of people [c]. So if a man reſolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is univerſal malice. And, if two or more come together to do an unlawful act againſt the king's peace, of which the probable conſequence might be bloodſhed, as to beat a man, to commit a riot, or to rob a park: and one of them kills a man; it is murder in them all, becauſe of the unlawful act, the *malitia praecogitata*, or evil intended before-hand [d].

ALSO in many caſes where no malice is expreſſed, the law will imply it: as, where a man willfully poiſons another, in ſuch a deliberate act the law preſumes malice, though no particular enmity can be proved [e]. And if a man kills another ſuddenly, without any, or without a conſiderable provocation, the law implies malice; for no perſon, unleſs of an abandoned heart, would be guilty of ſuch an act, upon a ſlight or no apparent cauſe. No affront, by words or geſtures only, is a ſufficient provocation, ſo as to excuſe or extenuate ſuch acts of violence as manifeſtly endanger the life of another [f]. But if the perſon ſo provoked had unfortunately killed the other, by beating him in ſuch a manner as ſhewed only an intent to chaſtiſe and not to kill him, the law ſo far conſiders the provocation of contumelious behaviour, as to adjudge it only manſlaughter, and not murder [g]. In like manner if one kills an officer of juſtice, either civil or criminal, in the execution of his duty, or any of his aſſiſtants

[a] 1 Hal. P. C. 454. 473, 474.
[b] Lord Raym. 143.
[c] 1 Hawk. P. C. 74.
[d] *Ibid.* 84.
[e] 1 Hal. P. C. 455.
[f] 1 Hawk. P. C. 82. 1 Hal. P. C. 455, 456.
[g] Foſt. 291.

endeavouring to conſerve the peace, or any private perſon endeavouring to ſuppreſs an affray or apprehend a felon, knowing his authority or the intention with which he interpoſes, the law will imply malice, and the killer ſhall be guilty of murder [h]. And if one intends to do another felony,
[201] and undeſignedly kills a man, this is alſo murder [i]. Thus if one ſhoots at A and miſſes *him*, but kills B, this is murder; becauſe of the previous felonious intent, which the law tranſfers from one to the other. The ſame is the caſe where one lays poiſon for A; and B, againſt whom the priſoner had no malicious intent, takes it, and it kills him; this is likewiſe murder [j]. So alſo, if one gives a woman with child a medicine to procure abortion, and it operates ſo violently as to kill the woman, this is murder in the perſon who gave it [k]. It were endleſs to go through all the caſes of homicide, which have been adjudged either expreſsly, or impliedly, malicious: theſe therefore may ſuffice as a ſpecimen; and we may take it for a general rule that all homicide is malicious, and of courſe amounts to murder, unleſs where *juſtified* by the command or permiſſion of the law; *excuſed* on the account of accident or ſelf-preſervation; or *alleviated* into manſlaughter, by being either the involuntary conſequence of ſome act, not ſtrictly lawful, or (if voluntary) occaſioned by ſome ſudden and ſufficiently violent provocation. And all theſe circumſtances of juſtification, excuſe, or alleviation, it is incumbent upon the priſoner to make out, to the ſatisfaction of the court and jury: the latter of whom are to decide whether the circumſtances alleged are proved to have actually exiſted; the former, how far they extend to take away or mitigate the guilt. For all homicide is preſumed to be malicious, until the contrary appeareth upon evidence [l].

THE puniſhment of murder, and that of manſlaughter, were formerly one and the ſame; both having the benefit of

[h] 1 Hal. P. C. 457. Foſter, 308, &c.
[i] 1 Hal. P. C. 465.
[j] *Ibid.* 466.
[k] *Ibid.* 429.
[l] Foſt. 255.

clergy:

clergy: so that none but unlearned persons, who least knew the guilt of it, were put to death for this enormous crime [m]. But now, by several statutes [n], the benefit of clergy is taken away from murderers through malice prepense, their abettors, procurers, and counsellors. In atrocious cases, it was frequently usual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place where the fact was committed: but this was no part of the [202] legal judgment; and the like is still sometimes practised in the case of notorious thieves. This, being quite contrary to the express command of the mosaical law [o], seems to have been borrowed from the civil law: which, besides the terror of the example, gives also another reason for this practice, *viz.* that it is a comfortable sight to the relations and friends of the deceased [p]. But now in England, it is enacted by statute 25 Geo. II. c. 37. that the judge, before whom any person is found guilty of wilful murder, shall pronounce sentence immediately after conviction, unless he sees cause to postpone it; and shall in passing sentence direct him to be executed on the next day but one, (unless the same shall be sunday, and then on the monday following,) and that his body be delivered to the surgeons to be dissected and anatomized [q]: and that the judge may direct his body to be afterwards hung in chains (6), but in no wise to be buried without dissection. And, during the short but awful interval between sentence and execution, the prisoner shall be kept

[m] 1 Hal. P. C. 450.

[n] 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12. 4 & 5 Ph. & M. c. 4.

[o] "The body of a malefactor shall "not remain all night upon the tree; "but thou shalt in any wise bury him "that day, that the land be not de- "filed." Deut. xxi. 23.

[p] "*Famosos latrones, in his locis, ubi* "*graffati sunt, furca figendos placuit;* "*ut, et conspectu deterreantur alii, et* "*solatio sit cognatis interemptorum,* "*eodem loco poena reddita, in quo la-* "*trones homicidia fecissent.*" *Ff.* 48. 19. 28. § 15.

[q] Fost. 107.

(6) The judge, if he thinks it advisable, may afterwards direct the hanging in chains, by a special order to the sheriff; but it does not form any part of the judgment. *Fost.* 107.

alone,

alone, and fuſtained with only bread and water. But a power is allowed to the judge upon good and ſufficient cauſe to reſpite the execution, and relax the other reſtraints of this act.

By the Roman law, *parricide*, or the murder of one's parents or children, was puniſhed in a much ſeverer manner than any other kind of homicide. After being ſcourged, the delinquents were ſewed up in a leathern ſack, with a live dog, a cock, a viper, and an ape, and ſo caſt into the ſea[r]. Solon, it is true, in his laws, made none againſt parricide; apprehending it impoſſible that any one ſhould be guilty of ſo unnatural a barbarity[s]. And the Perſians, according to Herodotus, entertained the ſame notion, when they adjudged all perſons who killed their reputed parents to be baſtards. And, upon ſome ſuch reaſon as this, we muſt account for
[203] the omiſſion of an exemplary puniſhment for this crime in our Engliſh laws; which treat it no otherwiſe than as ſimple murder, unleſs the child was alſo the ſervant of his parent[t].

For, though the breach of natural relation is unobſerved, yet the breach of civil or eccleſiaſtical connexions, when coupled with murder, denominates it a new offence, no leſs than a ſpecies of treaſon, called *parva proditio*, or *petit treaſon*: which however is nothing elſe but an aggravated degree of murder[u]; although, on account of the violation of private allegiance, it is ſtigmatized as an inferior ſpecies of treaſon[w]. And thus, in the antient Gothic conſtitution, we find the breach both of natural and civil relations ranked in the ſame claſs with crimes againſt the ſtate and the ſovereign[x].

Petit treaſon, according to the ſtatute 25 Edw. III. c. 2. may happen three ways: by a ſervant killing his maſter, a

[r] *Ff.* 48. 9. 9.
[s] Cic. *pro S. Roſcio.* § 25.
[t] 1 Hal. P. C. 380.
[u] Foſter. 107. 324. 336.
[w] See pag. 75.
[x] "*Omnium graviſſima cenſetur vis facta ab incolis in patriam, ſubditis in regem, liberis in parentes, maritis in uxores, (et vice verſâ,) ſervis in domines, aut etiam ab homine in ſemet ipſum.*" Stiernh. *de jure Goth. l.* 3. c. 3.

wife

wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience. A servant who kills his master whom he has left, upon a grudge conceived against him during his service, is guilty of petit treason: for the traiterous intention was hatched while the relation subsisted between them; and this is only an execution of that intention[x]. So if a wife be divorced *a mensa et thoro*, still the *vinculum matrimonii* subsists; and if she kills such divorced husband, she is a traitress[y]. And a clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop: and therefore to kill any of these is petit treason[z]. As to the rest, whatever has been said, or remains to be observed hereafter, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in its most odious degree: except that [204] the trial shall be as in cases of high treason, before the improvements therein made by the statutes of William III[a]. But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder[b]: and in such case it should seem that *two* witnesses are not necessary, as in case of petit treason they are (7). Which crime is also distinguished from murder in its punishment.

THE punishment of petit treason, in a man, is to be drawn and hanged, and in a woman, to be drawn and burnt[c]: the idea of which latter punishment seems to have been handed down to us by the laws of the antient Druids, which con-

[x] 1 Hawk. P. C. 89. 1 Hal. P. C. 380.
[y] 1 Hal. P. C. 381.
[z] *Ibid.*
[a] Fost. 337.
[b] Foster. 106. 1 Hal. P. C. 378. 2 Hal. P. C. 184.
[c] 1 Hal. P. C. 382. 3 Inst. 211.

(7) It has been determined, that a person indicted for petit treason, may upon the evidence of one witness be convicted of murder, though acquitted of the petit treason. *Radbourne's case*, *Leach*, 363.

demned

demned a woman to be burnt for murdering her husband [d]; and it is now the usual punishment for all sorts of treasons committed by those of the female sex [e] (8). Persons guilty of petit treason were first debarred the benefit of clergy, by statute 12 Hen. VII. c. 7. which has been since extended to their aiders, abettors, and counsellors, by statutes 23 Hen. VIII. c. 1. and 4 & 5 P. & M. c. 4.

[d] Cæsar *de bell. Gall. l.* 6. *c.* 18. [e] See pag. 93.

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(8) By the 30 Geo. III. c. 48. women shall no longer be sentenced to be burnt; but in all cases of high and petit treason they shall be condemned to be drawn and hanged; and in petit treason they shall be subject besides to the same judgment with regard to dissection and the time of execution as is directed by the 25 Geo. II. c. 37. in cases of murder. Soon after the passing of the 25 Geo. II. c. 37. the majority of the judges agreed, that in the case of men convicted of petit treason, the judgment introduced by that statute should be added to the common law judgment for petit treason. *Fost.* 107.

CHAPTER THE FIFTEENTH.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

HAVING in the preceding chapter considered the principal crime, or public wrong, that can be committed against a private subject, namely, by destroying his life; I proceed now to inquire into such other crimes and misdemesnors, as more peculiar affect the security of his person, while living.

Of these some are felonious, and in their nature capital: others are simple misdemesnors, and punishable with a lighter animadversion. Of the felonies the first is that of *mayhem*.

I. MAYHEM, *mayhemium*, was in part considered in the preceding volume [a], as a civil injury: but it is also looked upon in a criminal light by the law; being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary [b]. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to

[a] See Vol. III. pag. 121. [b] Brit. l. 1. c. 25. 1 Hawk. P. C. 111.

be

be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

By the antient law of England he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part; *membrum pro membro*[c]; which is still the law in Sweden[d]. But this went afterwards out of use: partly because the law of retaliation, as was formerly shewn[e], is at best an inadequate rule of punishment; and partly because upon a repetition of the offence the punishment could not be repeated. So that, by the common law, as it for a long time stood, mayhem was only punishable with fine and imprisonment[f]; unless perhaps the offence of mayhem by castration, which all our old writers held to be felony; "*et sequitur aliquando poena capitalis, aliquando perpetuum exilium, cum omnium bonorum ademptione*[g]." And this, although the mayhem was committed upon the highest provocation[h].

But subsequent statutes have put the crime and punishment of mayhem more out of doubt. For first, by statute 5 Hen. IV. c. 5. to remedy a mischief that then prevailed, of beating, wounding, or robbing a man, and then cutting out his *tongue*, or putting out his *eyes*, to prevent him from being an evidence against them, this offence is declared to be felony, if done of malice prepense; that is, as sir Edward Coke[i] explains it, voluntarily, and of set purpose, though done upon a sudden occasion. Next, in order of time, is the statute 37 Hen. VIII. c. 6. which directs, that if a man shall maliciously and unlawfully cut off the *ear* of any of the

[c] 3 Inst. 118.—*Mes, si la pleynte soit faite de femme qui avera tolle a home ses membres, en tiel cese perdra le feme la une meyn par jugement, come le membre dount ele avera trespasse.* (Brit. c. 25.)

[d] Stiernhook *de jure Sueon. l.* 3. *t.* 3.

[e] See pag. 12.

[f] 1 Hawk. P. C. 112.

[g] Bract. *fol.* 144.

[h] Sir Edward Coke (3 Inst. 62.) has transcribed a record of Henry the third's time, (*Clauf.* 13 *Hen. III. m.* 9.) by which a gentleman of Somersetshire and his wife appears to have been apprehended and committed to prison, being indicted for dealing thus with John the monk, who was caught in adultery with the wife.

[i] 3 Inst. 62.

king's

king's ſubjects, he ſhall not only forfeit treble damages to the party grieved, to be recovered by action of treſpaſs at [207] common law, as a civil ſatisfaction; but alſo 10*l.* by way of fine to the king, which was his criminal amercement. The laſt ſtatute, but by far the moſt ſevere and effectual of all, is that of 22 & 23 Car. II. c. 1. called the Coventry act; being occaſioned by an aſſault on ſir John Coventry in the ſtreet, and ſlitting his noſe, in revenge (as was ſuppoſed) for ſome obnoxious words uttered by him in parliament. By this ſtatute it is enacted, that if any perſon ſhall of malice aforethought, and by lying in wait, unlawfully cut out or diſable the tongue, put out an eye, ſlit the noſe, cut off a noſe or lip, or cut off or diſable any limb or member of any other perſon, *with intent to maim or to diſfigure him*; ſuch perſon, his counſellors, aiders, and abettors, ſhall be guilty of felony without benefit of clergy [k] (1).

[k] On this ſtatute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact of ſlitting the noſe of Mr. Criſpe, Coke's brother-in-law. The caſe was ſomewhat ſingular. The murder of Criſpe was intended, and he was left for dead, being terribly hacked and diſfigured with a hedge-bill; but he recovered. Now the bare intent to murder is no felony; but to diſfigure with an intent to diſfigure, is made ſo by this ſtatute; on which they were therefore indicted. And Coke, who was a diſgrace to the profeſſion of the law, had the effrontery to reſt his defence upon this point, that the aſſault was not committed with an intent to diſfigure, but with an intent to murder; and therefore not within the ſtatute. But the court held, that if a man attacks another to murder him with ſuch an inſtrument as a hedge-bill, which cannot but endanger the diſfiguring him; and in ſuch attack happens not to kill, but only to diſfigure him; he may be indicted on this ſtatute; and it ſhall be left to the jury whether it were not a deſign to murder by diſfiguring, and conſequently a malicious intent to diſfigure as well as to murder. Accordingly the jury found them guilty of ſuch previous intent to diſfigure, in order to effect their principal intent to murder, and they were both condemned and executed. (State Trials. VI. 212.)

(1) In a caſe where a gentleman had apprehended a pick-pocket, an accomplice followed and gave the gentleman a wound acroſs the noſe with a knife; this was held to be a *ſlitting of the noſe* and a maiming within the ſtatute. *Carrol's caſe, Leach*, 83. It has been determined, that if a man deliberately watches an opportunity and carries his intention into execution, he may be ſaid to lie in wait; but where a perſon went up to a man ſtealing turnips, who immediately

THUS much for the felony of mayhem: to which may be added the offence of wilfully and maliciously shooting at any person, in any dwelling-house or other place; an offence, of which the probable consequence may be either killing or maiming him. This, though no such evil consequence ensues, is made felony without benefit of clergy by statute 9 Geo. I. c. 22. and thereupon one Arnold was convicted in 1723 for shooting at lord Onslow; but, being half a mad-
[208] man, was never executed, but confined in prison, where he died about thirty years after (2).

II. THE second offence, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their *forcible abduction* and *marriage*; which is vulgarly called *stealing an heiress*. For by statute 3 Hen. VII. c. 2. it is enacted, that if any person shall for lucre take any woman, being maid, widow, or wife, and having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such misdoer, or by his consent to another, or defiled; such person, his procurers and abettors,

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diately cut him in the face, this was thought not to be lying in wait within the statute. *Tickner's case*, *Ib.* 170. A wound or incision in the throat has been held not to be a maiming. *Lee's case*, *Ib.* 49.

(2) The offence of this crime consists in *maliciously* shooting; no act of shooting therefore will amount, under this statute, to a capital offence, unless it be accompanied with such circumstances as in construction of law would have amounted to the crime of murder, if death had ensued from such an act; for there is no species of homicide in which malice forms any ingredient except that of murder; it follows therefore that a shooting in the transport of passion, excited by such a degree of provocation, as would reduce the homicide to the offence of manslaughter, is not within the meaning of the statute. *Gastineaux's case*, *Leach*, 323.

Three persons were indicted on the Black Act for shooting at the prosecutor; they were all charged with the single act, and the indictment was held by all the judges of England to be sufficient. Mr. *J. Buller*, 3 *T. R.* 105.

and such as knowingly receive such woman, shall be deemed principal felons; and by statute 39 Eliz. c. 9. the benefit of clergy is taken away from all such felons, who shall be principals, procurers, or accessories *before* the fact.

In the construction of this statute it hath been determined, 1. That the indictment must allege that the taking was for lucre, for such are the words of the statute [l]. 2. In order to shew this, it must appear that the woman has substance either real or personal, or is an heir apparent [m]. 3. It must appear that she was taken away against her will. 4. It must also appear, that she was afterwards married, or defiled. And though possibly the marriage or defilement might be by her subsequent consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking were against her will [n]: and so *vice versa*, if the woman be originally taken away by her own consent, yet if she afterwards refuse to continue with the offender, and be forced against her will, she may, from that time, as properly be said to be taken against her will, as if she never had given any consent at all; for till the force was put upon her, she was in her own power [o]. It is held that a woman, thus taken away and married, may be sworn and give evidence against the offender, though he is her husband *de facto*; contrary to the general rule of law; because he is no husband *de jure*, in case the actual marriage was also against her will [p]. In cases indeed where the actual marriage is good, by the consent of the inveigled woman obtained after her forcible abduction, sir Matthew Hale seems to question how far her evidence should be allowed: but other authorities [q] seem to agree, that it should even then be admitted; esteeming it absurd, that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should (by a forced construction of law)

[209]

[l] 1 Hawk. P. C. 110.
[m] 1 Hal. P. C. 660. 1 Hawk. P. C. 109.
[n] 1 Hal. P. C. 660.
[o] 1 Hawk. P. C. 110.
[p] 1 Hal. P. C. 661.
[q] Cro. Car. 488. 3 Keb. 193. State Trials. V. 455.

be made use of to stop the mouth of the most material witness against him.

AN inferior degree of the same kind of offence, but not attended with force, is punished by the statute 4 & 5 Ph. & Mar. c. 8. which enacts, that if any person, above the age of fourteen, unlawfully shall convey or *take away any woman child unmarried*, (which is held[r] to extend to bastards as well as to legitimate children,) within the age of sixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned two years, or fined at the discretion of the justices; and if he deflowers such maid or woman child, or without the consent of parents contracts matrimony with her, *he* shall be imprisoned five years, or fined at the discretion of the justices, and *she* shall forfeit all her lands to her next of kin, during the life of her said husband (3). So that as these stolen marriages, under the age of sixteen, were usually upon mercenary views, this act, besides punishing the seducer, wisely removed the temptation. But this latter part of the act is now rendered
[210] almost useless, by provisions of a very different kind, which make the marriage totally void[s], in the statute 26 Geo. II. c. 33.

III. A THIRD offence, against the female part also of his majesty's subjects, but attended with greater aggravations than that of forcible marriage, is the crime of *rape*, *raptus mulierum*, or the carnal knowledge of a woman forcibly and against her will. This, by the Jewish law[t], was punished

[r] Stra. 1162. [s] See Vol. I. p. 437, &c. [t] Deut. xxii. 25.

(3) It has been decided in the court of exchequer, that she forfeits her lands only during the life of her husband. *Amb.* 73. Though the more natural construction of the statute seems to be, that the next heir shall retain them during the life of the wife, even after the death of the husband. 1 *Brown.* 23.

with

with death, in case the damsel was betrothed to another man; and in case she was not betrothed, then a heavy fine of fifty shekels was to be paid to the damsel's father, and she was to be the wife of the ravisher all the days of his life; without that power of divorce, which was in general permitted by the mosaic law.

THE civil law[u] punishes the crime of ravishment with death and confiscation of goods: under which it includes both the offence of forcible abduction, or taking away a woman from her friends, of which we last spoke: and also the present offence of forcibly dishonouring them; either of which, without the other, is in that law sufficient to constitute a capital crime. Also the stealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether she consent or is forced: "*sive volentibus, sive nolentibus mulieribus, tale facinus fuerit* "*perpetratum.*" And this, in order to take away from women every opportunity of offending in this way; whom the Roman law supposes never to go astray, without the seduction and arts of the other sex: and therefore by restraining and making so highly penal the solicitations of the men, they meant to secure effectually the honour of the women. "*Si* "*enim ipsi raptores metu, vel atrocitate poene, ab hujusmodi* "*facinore se temperaverint, nulli mulieri, sive volenti, sive nolenti,* "*peccandi locus relinquetur; quia hoc ipsum* velle *mulierum, ab* "*insidiis nequissimi hominis, qui meditatur rapinam, inducitur.* "*Nisi etenim eam solicitaverit, nisi odiosis artibus circumvenerit,* [211] "*non faciet eam velle in tantum dedecus sese prodere.*" But our English law does not entertain quite such sublime ideas of the honour of either sex, as to lay the blame of a mutual fault upon one of the transgressors only: and therefore makes it a necessary ingredient in the crime of rape, that it must be against the woman's will.

RAPE was punished by the Saxon laws, particularly those of king Athelstan[w], with death: which was also agreeable

[u] *Cod.* 9. *tit.* 13. [w] Bracton. *l.* 3. *c.* 28.

to the old Gothic or Scandinavian conſtitution [x]. But this was afterwards thought too hard: and in its ſtead another ſevere, but not capital, puniſhment, was inflicted by William the conqueror; *viz.* caſtration, and loſs of eyes [y]; which continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accuſations, it was then the law, (and, it ſeems, ſtill continues to be ſo in appeals of rape [z],) that the woman ſhould immediately after, "*dum recens fuerit maleficium*," go to the next town, and there make diſcovery to ſome credible perſons of the injury ſhe has ſuffered: and afterwards ſhould acquaint the high conſtable of the hundred, the coroners, and the ſheriff with the outrage [a]. This ſeems to correſpond in ſome degree with the laws of Scotland and Arragon [b], which require that complaint muſt be made within twenty-four hours: though afterwards by ſtatute Weſtm. 1. c. 13. the time of limitation in England was extended to forty days. At preſent there is no time of limitation fixed: for, as it is uſually now puniſhed by indictment at the ſuit of the king, the maxim of law takes place, that *nullum tempus occurrit regi:* but the jury will rarely give credit to a ſtale complaint. During the former period alſo it was held for law [c], that the woman (by conſent of the judge and her parents) might redeem the offender from the execution of his ſentence, by accepting him for her huſband; if he alſo was willing to agree to the exchange, but not otherwiſe.

[212] In the 3 Edw. I. by the ſtatute Weſtm. 1. c. 13. the puniſhment of rape was much mitigated: the offence itſelf, of raviſhing a damſel within age, (that is, *twelve* years old,) either with her conſent or without, or of any other woman againſt her will, being reduced to a treſpaſs, if not proſecuted by appeal within forty days, and ſubjecting the offender only to two years impriſonment, and a fine at the king's will.

[x] Stiern. *de jure Sueon. l.* 3. *c.* 2.
[y] *LL. Guil. Conqu. c.* 19.
[z] 1 Hal. P. C. 632.
[a] Glanv. *l.* 14. *c.* 6. Bract. *l.* 3. *c.* 28.
[b] Barrington, 142.
[c] Glanv. *l.* 14. *c.* 6. Bract. *l.* 3. *c.* 28.

But this lenity being productive of the moſt terrible conſequences, it was in ten years afterwards, 13 Edw. I. found neceſſary to make the offence of forcible rape felony by ſtatute Weſtm. 2. c. 34. And by ſtatute 18 Eliz. c. 7. it is made felony without benefit of clergy: as is alſo the abominable wickedneſs of carnally knowing and abuſing any woman child under the age of ten years; in which caſe the conſent or non-conſent is immaterial, as by reaſon of her tender years ſhe is incapable of judgment and diſcretion. Sir Matthew Hale is indeed of opinion, that ſuch profligate actions committed on an infant under the age of *twelve* years, the age of female diſcretion by the common law, either with or without conſent, amount to rape and felony; as well ſince as before the ſtatute of queen Elizabeth [d]: but that law has in general been held only to extend to infants under *ten*; though it ſhould ſeem that damſels between *ten* and *twelve* are ſtill under the protection of the ſtatute Weſtm. 1. the law with reſpect to their ſeduction not having been altered by either of the ſubſequent ſtatutes.

A MALE infant under the age of fourteen years, is preſumed by law incapable to commit a rape, and therefore it ſeems cannot be found guilty of it. For though in other felonies *malitia ſupplet ætatem*, as has in ſome caſes been ſhewn; yet, as to this particular ſpecies of felony, the law ſuppoſes an imbecility of body as well as mind [e].

THE civil law ſeems to ſuppoſe a proſtitute or common harlot incapable of any injuries of this kind [f]: not allowing any puniſhment for violating the chaſtity of her, who hath [213] indeed no chaſtity at all, or at leaſt hath no regard to it. But the law of England does not judge ſo hardly of offenders, as to cut off all opportunity of retreat even from common ſtrumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; becauſe the woman may have forſaken that unlawful

[d] 1 Hal. P. C. 631. [e] *Ibid.* [f] *Cod.* 9. 9. 22. *Ff.* 47. 2. 39.

courſe of life [g]: for, as Bracton well obſerves [h], "*licet meretrix fuerit antea, certe tunc temporis non fuit, cum reclamando nequitiae ejus conſentire noluit.*"

As to the material facts requiſite to be given in evidence and proved upon an indictment of rape, they are of ſuch a nature, that though neceſſary to be known and ſettled, for the conviction of the guilty and preſervation of the innocent, and therefore are to be found in ſuch criminal treatiſes as diſcourſe of theſe matters in detail, yet they are highly improper to be publicly diſcuſſed, except only in a court of juſtice. I ſhall therefore merely add upon this head a few remarks from ſir Matthew Hale; with regard to the competency and credibility of witneſſes; which may, *ſalvo pudore*, be conſidered.

AND, firſt, the party raviſhed may give evidence upon oath, and is in law a competent witneſs; but the credibility of her teſtimony, and how far forth ſhe is to be believed, muſt be left to the jury upon the circumſtances of fact that concur in that teſtimony. For inſtance; if the witneſs be of good fame; if ſhe preſently diſcovered the offence, and made ſearch for the offender; if the party accuſed fled for it; theſe and the like are concurring circumſtances which give greater probability to her evidence. But, on the other ſide, if ſhe be of evil fame, and ſtand unſupported by others; if ſhe concealed the injury for any conſiderable time after ſhe had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was poſſible ſhe might
[214] have been heard, and ſhe made no outcry: theſe and the like circumſtances carry a ſtrong, but not concluſive, preſumption that her teſtimony is falſe or feigned.

MOREOVER, if the rape be charged to be committed on an infant under twelve years of age, ſhe may ſtill be a competent witneſs, if ſhe hath ſenſe and underſtanding to know

[g] 1 Hal. P. C. 629. 1 Hawk. P. C. 108. [h] *fol.* 147.

the

the nature and obligations of an oath; or even to be ſenſible of the wickedneſs of telling a deliberate lie. Nay, though ſhe hath not, it is thought by ſir Matthew Hale [i] that ſhe ought to be heard without oath, to give the court information; and others have held, that what the child told her mother, or other relations, may be given in evidence, ſince the nature of the caſe admits frequently of no better proof. But it is now ſettled, [Brazier's caſe, before the twelve judges, P. 19 Geo. III.] that no hearſay evidence can be given of the declaration of a child who hath not capacity to be ſworn, nor can ſuch child be examined in court without oath: and that there is no determinate age, at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wiſhed, in order to render their evidence credible, that there ſhould be ſome concurrent teſtimony, of time, place, and circumſtances, in order to make out the fact; and that the conviction ſhould not be grounded ſingly on the unſupported accuſation of an infant under years of diſcretion. There may be therefore, in many caſes of this nature, witneſſes who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or ſuch as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witneſſes, as well as of the truth of the fact.

"IT is true, ſays this learned judge [j], that rape is a moſt "deteſtable crime, and therefore ought ſeverely and impar- "tially to be puniſhed with death; but it muſt be remem- [215] "bered that it is an accuſation eaſy to be made, hard to be "proved, but harder to be defended by the party accuſed, "though innocent." He then relates two very extraordinary caſes of malicious proſecution for this crime, that had happened within his own obſervation; and concludes thus; "I "mention theſe inſtances, that we may be the more cautious

[i] 1 Hal. P. C. 634. [j] *Ibid.* 635.

"upon trials of offences of this nature, wherein the court "and jury may with so much ease be imposed upon, without "great care and vigilance; the heinousness of the offence "many times transporting the judge and jury with so much "indignation, that they are overhastly carried on to the con- "viction of the person accused thereof, by the confident tes- "timony of sometimes false and malicious witnesses."

IV. What has been here observed, especially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more detestable, may be applied to another offence, of a still deeper malignity; the infamous *crime against nature*, committed either with man or beast. A crime, which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out: for, if false, it deserves a punishment inferior only to that of the crime itself.

I will not act so disagreeable a part, to my readers as well as myself, as to dwell any longer upon a subject, the very mention of which is a disgrace to human nature. It will be more eligible to imitate in this respect the delicacy of our English law, which treats it, in its very indictments, as a crime not fit to be named; "*peccatum illud horribile, inter* "*christianos non nominandum*[k]." A taciturnity observed likewise by the edict of Constantius and Constans[l]; "*ubi scelus* "*est id, quod non proficit scire, jubemus insurgere leges, armari*
[216] "*jura gladio ultore, ut exquisitis poenis subdantur infames, qui* "*sunt, vel qui futuri sunt rei.*" Which leads me to add a word concerning it's punishment.

This the voice of nature and of reason, and the express law of God[m], determined to be capital. Of which we have

[k] See in *Rot. Parl.* 50 Edw. III. n. 58. a complaint that a Lombard did commit the sin "that was not to be "named." (12 Rep. 37.)

[l] *Cod.* 9. 9. 31.

[m] Levit. xx. 13. 15.

a signal

a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven; so that this is an universal, not merely a provincial, precept. And our antient law in some degree imitated this punishment, by commanding such miscreants to be burnt to death [n]; though Fleta [o] says they should be buried alive: either of which punishments was indifferently used for this crime among the antient Goths [p]. But now the general punishment of all felonies is the same, namely, by hanging: and this offence (being in the times of popery only subject to ecclesiastical censures) was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6. revived and confirmed by 5 Eliz. c. 17. And the rule of law herein is, that, if both are arrived at years of discretion, *agentes et consentientes pari poena plectantur* [q].

THESE are all the felonious offences more immediately against the personal security of the subject. The inferior offences, or misdemesnors, that fall under this head, are *assaults, batteries, wounding, false imprisonment, and kidnapping.*

V, VI, VII. WITH regard to the nature of the three first of these offences in general, I have nothing farther to add to what has already been observed in the preceding book of these commentaries [r]; when we consider them as private wrongs, or civil injuries, for which a satisfaction or remedy is given to the party aggrieved. But, taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fines and imprisonment; or with other ignominious corporal penalties, where they are committed with any very atrocious design [s]. As in case of an assault with an intent to murder, or with an intent to commit either of the [217]

[n] Brit. c. 9.
[o] l. 1 c. 37.
[p] Stiernh. *de jure Goth.* l. 3. c. 2.
[q] 3 Inst. 59.
[r] See Vol. III. pag. 120.
[s] 1 Hawk. P. C. 65.

crimes

crimes laſt ſpoken of; for which intentional aſſaults, in the two laſt caſes, indictments are much more uſual, than for the abſolute perpetration of the facts themſelves, on account of the difficulty of proof: or, when both parties are conſenting to an unnatural attempt, it is uſual not to charge any *aſſault*; but that one of them laid hands on the other with intent to commit, and that the other permitted the ſame with intent to ſuffer, the commiſſion of the abominable crime beforementioned. And, in all theſe caſes, beſides heavy fine and impriſonment, it is uſual to award judgment of the pillory.

THERE is alſo one ſpecies of battery more atrocious and penal than the reſt, which is the beating of a clerk in orders, or clergyman; on account of the reſpect and reverence due to his ſacred character, as the miniſter and embaſſador of peace. Accordingly it is enacted by the ſtatute called *articuli cleri*, 9 Edw. II. c. 3. that if any perſon lay violent hands upon a clerk, the amends for the peace broken ſhall be before the king; that is, by indictment in the king's courts: and the aſſailant may alſo be ſued before the biſhop, that excommunication or bodily penance may be impoſed: which if the offender will redeem by money, to be given to the biſhop, or the party aggrieved, it may be ſued for before the biſhop; whereas otherwiſe to ſue in any ſpiritual court, for civil damages for the battery, falls within the danger of *praemunire* [t]. But ſuits are, and always were, allowable in the ſpiritual court, for money agreed to be given as a commutation for penance [u]. So that upon the whole it appears, that a perſon guilty of ſuch brutal behaviour to a clergyman, is ſubject to three kinds of proſecution, all of which may be purſued for one and the ſame offence: an indictment, for the breach of the king's peace by ſuch aſſault and battery; a civil action, for the ſpecial damage ſuſtained by the party injured; and a ſuit in the

[t] 2 Inſt. 492. 620.

[u] *Artic. Cler.* 9 *Edw. II.* c. 4. F. N. B. 53.

eccleſiaſtical

ecclesiastical court, first, *pro correctione et salute animae*, by *enjoining* penance, and then again for such sum of money as shall be agreed on for *taking off* the penance enjoined: it being usual in those courts to exchange their spiritual censures for a round compensation in money[v]; perhaps because poverty is generally esteemed by the moralists the best medicine *pro salute animae*.

VIII. THE two remaining crimes and offences, against the persons of his majesty's subjects, are infringements of their natural liberty: concerning the first of which, *false imprisonment*, its nature and incidents, I must content myself with referring the student to what was observed in the preceding volume[w], when we considered it as a mere civil injury. But, besides the private satisfaction given to the individual by action, the law also demands public vengeance for the breach of the king's peace, for the loss which the state sustains by the confinement of one of it's members, and for the infringement of the good order of society. We have seen before[x], that the most atrocious degree of this offence, that of sending any subject of this realm a prisoner into parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is punished with the pains of *praemunire*, and incapacity to hold any office, without any possibility of pardon[y]. And we may also add, that by statute 43 Eliz. c. 13. to carry any one by force out of the four northern counties, or imprison him within the same, in order to ransom him or make spoil of his person or goods, is felony without benefit of clergy in the principals and all accessories before the fact. Inferior degrees of the same offence, of false imprisonment, are also punishable by indictment, (like assaults and batteries,) and the delinquent may be fined and

[v] 2 Roll. Rep. 384.
[w] See Vol. III. pag. 127.
[x] See pag. 116.
[y] Stat. 31 Car. II. c. 2.

imprisoned.

imprisoned [z]. And indeed [a] there can be no doubt, but that all kinds of crimes of a public nature, all disturbances of the peace, all oppressions, and other misdemesnors whatsoever, of a notoriously evil example, may be indicted at the suit of the king.

[219] IX. The other remaining offence, that of *kidnapping*, being the forcible abduction or stealing away of a man, woman, or child, from their own country, and sending them into another, was capital by the Jewish law. "He "that stealeth a man, and selleth him, or if he be found in "his hand, he shall surely be put to death [b]." So likewise in the civil law, the offence of spiriting away and stealing "men and children; which was called *plagium*, and the offenders *plagiarii*, was punished with death [c]. This is unquestionably a very heinous crime, as it robs the king of his subjects, banishes a man from his country, and may in its consequences be productive of the most cruel and disagreeable hardships; and therefore the common law of England has punished it with fine, imprisonment, and pillory [d]. And also the statute 11 & 12 W. III. c. 7. though principally intended against pirates, has a clause that extends to prevent the leaving of such persons abroad, as are thus kidnapped or spirited away; by enacting, that if any captain of a merchant vessel shall (during his being abroad) force any person on shore, or wilfully leave him behind, or refuse to bring home all such men as he carried out, if able and desirous to return, he shall suffer three months imprisonment. And thus much for offences that more immediately affect the *persons* of individuals (4).

[z] West. Symbl. part 2. pag. 92.
[a] 1 Hawk. P. C. 210.
[b] Exod. xxi. 16.
[c] *Ff.* 48. 15. 1.
[d] Raym. 474. 2 Show. 221. Skin. 47. Comb. 10.

(4) Where a child is stolen for the sake of its cloaths, it is the same species of felony, as if the cloaths were stolen without the child.

child. But it cannot be considered a felony, where a child is stolen, and not deprived of its cloaths. This crime would in general be an aggravated species of false imprisonment; but without referring it to that class of offences, stealing a child from its parents is an act so shocking and horrid, that it would be considered the highest misdemeanour, punishable by fine, imprisonment, and pillory, upon the same principle on which it was decided to be a misdemeanour to steal a dead body from a grave. See 2 vol. 429.

CHAPTER THE SIXTEENTH.

OF OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

THE only two offences, that more immediately affect the *habitations* of individuals or private subjects, are those of *arson* and *burglary*.

1. ARSON, *ab ardendo*, is the malicious and wilful burning of the house or outhouse of another man. This is an offence of very great malignity, and much more pernicious to the public than simple theft: because, first, it is an offence against that right of habitation, which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attend it; and lastly, because in simple theft the thing stolen only changes its master, but still remains *in esse* for the benefit of the public, whereas by burning the very substance is absolutely destroyed. It is also frequently more destructive than murder itself, of which too it is often the cause: since murder, atrocious as it is, seldom extends beyond the felonious act designed; whereas fire too frequently involves in the common calamity persons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies. For which reason the civil law[a] punishes with death such as maliciously set fire to houses in towns, and contiguous to others; but is more merciful to such as only fire a cottage, or house, standing by itself.

[a] *Ff.* 48. 19. 28. § 12.

OUR Engliſh law alſo diſtinguiſhes with much accuracy upon this crime. And therefore we will inquire, firſt, what is ſuch a houſe as may be the ſubject of this offence: next, wherein the offence itſelf conſiſts, or what amounts to a burning of ſuch houſe; and laſtly, how the offence is puniſhed.

1. NOT only the bare dwelling houſe, but all out-houſes that are parcel thereof, though not contiguous thereto, nor under the ſame roof, as barns and ſtables, may be the ſubject of arſon [b]. And this by the common law: which alſo accounted it felony to burn a ſingle barn in the field, if filled with hay or corn, though not parcel of the dwelling houſe [c]. The burning of a ſtack of corn was antiently likewiſe accounted arſon [d]. And indeed all the niceties and diſtinctions which we meet with in our books, concerning what ſhall, or ſhall not, amount to arſon, ſeem now to be taken away by a variety of ſtatutes; which will be mentioned in the next chapter, and have made the puniſhment of wilful burning equally extenſive as the miſchief. The offence of arſon (ſtrictly ſo called) may be committed by wilfully ſetting fire to one's own houſe, provided one's neighbour's houſe is thereby alſo burnt; but if no miſchief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's [e]. For by the common law no intention to commit a felony amounts to the ſame crime; though it does, in ſome caſes, by particular ſtatutes. However ſuch wilful firing one's own houſe, *in a town*, is a high miſdemeſnor, and puniſhable by fine, impriſonment pillory, and perpetual ſureties for the good behaviour [f] (1).

[b] 1 Hal. P. C. 567.
[c] 3 Inſt. 69.
[d] 1 Hawk. P. C. 105.
[e] Cro. Car. 377. 1 Jon. 351.
[f] 1 Hal. P. C. 568. 1 Hawk. P. C. 106.

(1) It has been decided that an attempt, or preparation, to ſet fire to one's own houſe, though the fire be never kindled, is a miſdemeanour. And that every attempt to commit a felony is a miſdemeanour;

And if a landlord or reverſioner ſets fire to his own houſe, of which another is in poſſeſſion under a leaſe from himſelf or from thoſe whoſe eſtate he hath, it ſhall be accounted arſon; for, during the leaſe, the houſe is the property of the tenant [g] (2).

[222] 2. As to what ſhall be ſaid to be a *burning*, ſo as to amount to arſon, a bare intent, or attempt to do it, by actually ſetting fire to an houſe, unleſs it abſolutely *burns*, does not fall within the deſcription of *incendit et combuſſit*; which were words neceſſary, in the days of law-latin, to all indictments of this ſort. But the burning and conſuming of any part is ſufficient; though the fire be afterwards extinguiſhed [h]. Alſo it muſt be a *malicious* burning; otherwiſe it is only a treſpaſs: and therefore no negligence or miſchance amounts to it. For which reaſon, though an unqualified perſon, by

[g] Foſt. 115. [h] 1 Hawk. P. C. 106.

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miſdemeanour; and, in general, an attempt to commit a miſdemeanour is an offence of the ſame nature. *R.* v. *Scofield, Cald.* 397. So alſo an incitement or ſolicitation to commit a crime is a miſdemeanour. *R.* v. *Higgins*, 2 *Eaſt.* 5.

Voluntas reputatur pro facto is ſtill true, both in treaſon and miſdemeanour; but the intention in both muſt be manifeſted by an open act. Men cannot be puniſhed by the law for the thoughts of the mind, however wicked they may be: even a reſolution to commit high treaſon, evidenced only by a confeſſion, without any attempt to carry it into effect, is not puniſhable by the law of England. The principle of theſe caſes is well illuſtrated by Lord Coke, who, after treating of ſingle combats and affrays, ſays, "if any ſubject challenge another to fight, this is "alſo an offence, before any combat be performed, and puniſh-"able by law, for *quando aliquid prohibetur, prohibetur et omne, "per quod devenitur ad illud.*" 3 *Inſt.* 158.

(2) And it has been expreſsly determined, that if a tenant ſet fire to the houſe of his landlord, before the tenancy expires, he is not guilty of arſon. *Breeme's Caſe, Leach*, 195. 209.

ſhooting

ſhooting with a gun, happens to ſet fire to the thatch of a houſe, this ſir Matthew Hale determines not to be felony, contrary to the opinion of former writers [i]. But by ſtatute 6 Ann. c. 31. any ſervant, negligently ſetting fire to a houſe or out-houſes, ſhall forfeit 100 *l.* or be ſent to the houſe of correction for eighteen months; in the ſame manner as the Roman law directed, "*eos, qui negligenter ignes apud ſe ha-*"*buerint, fuſtibus vel flagellis caedi* [k]."

3. THE *puniſhment* of arſon was death by our antient Saxon laws [l]. And, in the reign of Edward the firſt, this ſentence was executed by a kind of *lex talionis*; for the incendiaries were burnt to death [m]: as they were alſo by the Gothic conſtitutions [n]. The ſtatute 8 Hen. VI. c. 6. made the wilful burning of houſes, under ſome ſpecial circumſtances therein mentioned, amount to the crime of high treaſon. But it was again reduced to felony by the general acts of Edward VI. and queen Mary; and now the puniſhment of all capital felonies is uniform, namely, by hanging. The offence of arſon was denied the benefit of clergy by ſtatute 21 Hen. VIII. c. 1. but that ſtatute was repealed by 1 Edw. VI. c. 12. and arſon was afterwards held to be ouſted of clergy, with reſpect to the principal offender, only by inference and deduction from the ſtatute 4 & 5 P. & M. [223] c. 4. which expreſsly denied it to the acceſſory before the fact [o]; though now it is expreſsly denied to the principal in all caſes within the ſtatute 9 Geo. I. c. 22.

II. BURGLARY, or nocturnal houſebreaking, *burgi latrocinium*, which by our antient law was called *hameſecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only becauſe of the abundant terror that it naturally carries with it, but alſo as it is a forcible invaſion and diſturbance of that right of habitation,

[i] 1 Hal. P. C. 569.
[k] *Ff.* 1. 15. 4.
[l] *LL. Inae. c.* 7.
[m] Britt. c. 9.
[n] Stiernh. *de jure Goth. l.* 3. *c.* 6.
[o] 11 Rep. 35. 2 Hal. P. C. 346, 347. Foſter. 336.

which every individual might acquire even in a ſtate of nature; an invaſion, which in ſuch a ſtate would be ſure to be puniſhed with death, unleſs the aſſailant were the ſtronger. But in civil ſociety, the laws alſo come in to the aſſiſtance of the weaker party: and, beſides that they leave him this natural right of killing the aggreſſor, if he can, (as was ſhewn in a former chapter [p],) they alſo protect and avenge him, in caſe the might of the aſſailant is too powerful. And the law of England has ſo particular and tender a regard to the immunity of a man's houſe, that it ſtyles it his caſtle, and will never ſuffer it to be violated with impunity: agreeing herein with the ſentiments of antient Rome, as expreſſed in the words of Tully [q]; "*quid enim ſanctius, quid omni re-*"*ligione munitius, quam domus uniuſcujuſque civium?*" For this reaſon no outward doors can in general be broken open to execute any civil proceſs; though, in criminal cauſes, the public ſafety ſuperſedes the private. Hence alſo in part ariſes the animadverſion of the law upon eaves-droppers, nuſancers, and incendiaries: and to this principle it muſt be aſſigned, that a man may aſſemble people together lawfully (at leaſt if they do not exceed eleven) without danger of raiſing a riot, rout, or unlawful aſſembly, in order to protect and defend his houſe; which he is not permitted to do in any other caſe [r].

[224] The definition of a burglar, as given us by ſir Edward Coke [s], is, "he that by night breaketh and entereth into a "manſion-houſe, with intent to commit a felony." In this definition there are four things to be conſidered; the *time*, the *place*, the *manner*, and the *intent*.

1. THE *time* muſt be by night, and not by day: for in the day time there is no burglary. We have ſeen [t], in the caſe of juſtifiable homicide, how much more heinous all

[p] See pag. 180.
[q] *pro domo*, 41.
[r] 1 Hal. P. C. 547.
[s] 3 Inſt. 63.
[t] See pag. 180, 181.

laws

laws made an attack by night, rather than by day; allowing the party attacked by night to kill the aſſailant with impunity. As to what is reckoned night, and what day, for this purpoſe: antiently the day was accounted to begin only at ſun-riſing, and to end immediately upon ſun-ſet; but the better opinion ſeems to be, that if there be daylight or *crepuſculum* enough, begun or left, to diſcern a man's face withal, it is no burglary [u]. But this does not extend to moonlight; for then many midnight burglaries would go unpuniſhed: and beſides, the malignity of the offence does not ſo properly ariſe from its being done in the dark, as at the dead of night; when all the creation, except beaſts of prey, are at reſt; when ſleep has diſarmed the owner, and rendered his caſtle defenceleſs.

2. As to the *place*. It muſt be, according to ſir Edward Coke's definition, in a *manſion*-houſe; and therefore to account for the reaſon why breaking open a church is burglary, as it undoubtedly is, he quaintly obſerves that it is *domus manſionalis Dei* [v]. But it does not ſeem abſolutely neceſſary that it ſhould in all caſes be a manſion-houſe; for it may alſo be committed by breaking the gates or walls of a *town* in the night [w]; though that perhaps ſir Edward Coke would have called the manſion-houſe of the garriſon or corporation. Spelman defines burglary to be, "*nocturna diruptio alicujus habitaculi, vel eccleſiae, etiam murorum portarumve burgi, ad feloniam perpetrandam.*" And therefore we may ſafely conclude, that the requiſite of its being *domus manſionalis* is only in the burglary of a private houſe: which is the moſt frequent, and which it is indiſpenſably neceſſary to form its guilt, that it muſt be in a manſion or dwelling houſe. For no diſtant barn, warehouſe, or the like, are under the ſame privileges, nor looked upon as a man's caſtle of defence: nor is a breaking open of houſes [225]

[u] 3 Inſt. 63. 1 Hal. P.C. 350. 1 Hawk. P.C. 101.

[v] 3 Inſt. 64.

[w] Spelm. *Gloſſ. t. Burglary.* 1 Hawk. P.C. 103.

wherein no man reſides, and which therefore for the time being are not manſion-houſes, attended with the ſame circumſtances of midnight terror. A houſe however, wherein a man ſometimes reſides, and which the owner hath only left for a ſhort ſeaſon, *animo revertendi*, is the object of burglary; though no one be in it at the time of the fact committed [x]. And if the barn, ſtable, or warehouſe, be parcel of the manſion-houſe and within the ſame common fence [y], though not under the ſame roof or contiguous, a burglary may be committed therein; for the capital houſe protects and privileges all its branches and appurtenants, if within the curtilage or home-ſtall [z] (3). A chamber in a college or an inn of court, where each inhabitant hath a diſtinct property, is, to all other purpoſes as well as this, the manſion-houſe of the owner [a]. So alſo is a room or lodging, in any private houſe, the manſion for the time being of the lodger; if the owner doth not himſelf dwell in the houſe, or if he and the lodger enter by different outward doors. But, if the owner himſelf lies in the houſe,

x 1 Hal. P. C. 566. Foſt. 77.

y *Kev. Garland.* P. 16 Geo. III. by all the judges.

z 1 Hal. P. C. 558. 1 Hawk. P. C. 104.

a 1 Hal. P. C. 556.

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(3) Where a houſe is built, purchaſed, or rented, and is under repairs, or is making ready for the reception of the owner's family, no burglary can be committed in it, until the owner, or ſome part of his family, goes to inhabit it. *Lyon's Caſe*, *Leach*, 169. *Thompſon's Caſe*, *Ibid.* 893.

Where an outhouſe was ſeparated from the dwelling-houſe by an open paſſage eight feet wide, but not connected with the dwelling-houſe by any fence incloſing both, the judges were unanimouſly of opinion that this was not part of the dwelling-houſe, and that no burglary could be committed in it. *Garland's Caſe*, *Leach*, 151. But it had been long before decided, that, where ſuch an outhouſe was connected with the dwelling-houſe only by a pale which reached betwixt them, burglary might be committed in it. *Caſtle's Caſe*, 1 *Hale*, 558.

and

and hath but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling-house of the owner [b]. Thus too the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers [c]. But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there; it is no dwelling-house, nor can burglary be committed [226] therein: for by the lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part; neither can I be said to dwell therein, when I never lie there [d] (4). Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein [e]: for the law regards thus highly nothing but permanent edifices; a house, or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon in the same circumstances.

3. As to the *manner* of committing burglary: there must be both a breaking and an entry to complete it. But they need not be both done at once: for, if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars [f]. There must in general be an actual breaking; not a mere legal *clausum fregit*, (by leaping over invisible ideal boundaries, which may constitute a civil tres-

[b] Kel. 84. 1 Hal. P. C. 556.
[c] Forster, 38, 39.
[d] 1 Hal. P. C. 558.
[e] 1 Hawk. P. C. 104.
[f] 1 Hal. P. C. 551.

(4) But where a shop was rented with some of the apartments of a house, it was held that the shop was still part of the dwelling-house, and that burglary might be committed in it, as the house of the landlord. *Gibson's Case*, *Leach*, 287.

paſs,) but a ſubſtantial and forcible irruption. As at leaſt by breaking, or taking out the glaſs of, or otherwiſe opening, a window: picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unlooſing any other faſtening which the owner has provided. But if a perſon leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein, it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is ſo [g]. But to come down a chimney is held a burglarious entry; for that is as much cloſed, as the nature of things will permit [h]. So alſo to knock at a door, and upon opening it to ruſh in, with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a conſtable to gain admittance, in order to ſearch for traitors, and then to bind the conſtable and rob the houſe; all theſe entries have been adjudged burgla-
[227] rious, though there was no actual breaking: for the law will not ſuffer itſelf to be trifled with by ſuch evaſions, eſpecially under the cloke of legal proceſs [i]. And ſo, if a ſervant opens and enters his maſter's chamber-door with a felonious deſign: or if any other perſon lodging in the ſame houſe, or in a public inn, opens and enters another's door, with ſuch evil intent; it is burglary. Nay, if the ſervant conſpires with a robber, and lets him into the houſe by night, this is burglary in both [k]: for the ſervant is doing an unlawful act, and the opportunity afforded him, of doing it with greater eaſe, rather aggravates than extenuates the guilt. As for the entry, any the leaſt degree of it, with any part of the body, or with an inſtrument held in the hand, is ſufficient; as, to ſtep over the threſhold, to put a hand or a hook in at a window to draw out goods, or a piſtol to demand one's money, are all of them burglarious entries [l] (5). The entry may be

[g] 1 Hal. P. C. 553.
[h] 1 Hawk. P. C. 102. 1 Hal. P. C. 552.
[i] 1 Hawk. P. C. 102.
[k] Stra. 881. 1 Hal. P. C. 553. 1 Hawk. P. C. 103.
[l] 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Foſt. 108.

(5) In a caſe where a door had been bored through by an inſtrument, called a *centre-bit*, the end of which muſt have penetrated

before the breaking, as well as after: for by ſtatute 12 Ann. c. 7. if a perſon enters into the dwelling-houſe of another, without breaking in, either by day or by night, with intent to commit felony, or, being in ſuch houſe, ſhall commit any felony; and ſhall in the night break out of the ſame, this is declared to be burglary; there having before been different opinions concerning it: lord Bacon [m] holding the affirmative, and ſir Matthew Hale [n] the negative. But it is univerſally agreed, that there muſt be both a breaking, either in fact or by implication, and alſo an entry, in order to complete the burglary.

4. As to the *intent*; it is clear, that ſuch breaking and entry muſt be with a felonious intent, otherwiſe it is only a treſpaſs. And it is the ſame, whether ſuch intention be actually carried into execution, or only demonſtrated by ſome attempt or overt act, of which the jury is to judge. And therefore ſuch a breach and entry of a houſe as has been before deſcribed, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; [228] whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created ſo by ſtatute; ſince that ſtatute, which makes an offence felony, gives it incidentally all the properties of a felony at common law [o].

THUS much for the nature of burglary; which is a felony at common law, but within the benefit of clergy. The

[m] Elem. 65.
[n] 1 Hal. P. C. 554.
[o] 1 Hawk. P. C. 105.

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trated beyond the internal ſurface of the door, it was held that this was not a ſufficient entry to conſtitute a burglary. When the inſertion of an inſtrument amounts to a burglarious entry, the inſtrument muſt be of ſuch a nature as is calculated to effect the intended felony after the breaking is completed. *Hughes's Caſe*, *Leach*, 313.

ſtatutes however of 1 Edw. VI. c. 12. and 18 Eliz. c. 7. take away clergy from the principals, and that of 3 & 4 W. & M. c. 9. from all abettors and acceſſories before the fact [p]. And, in like manner, the laws of Athens, which puniſhed no ſimple theft with death, made burglary a capital crime [q].

[p] Burglary in any houſe belonging to the plate glaſs company, with intent to ſteal the ſtock or utenſils, is by ſtatute 13 Geo. III. c. 38. declared to be ſingle felony, and puniſhed with tranſportation for ſeven years.

[q] Pott. Antiq. b. 1. c. 26.

CHAPTER THE SEVENTEENTH.

OF OFFENCES AGAINST PRIVATE PROPERTY.

THE next and laſt ſpecies of offences againſt private ſubjects, are ſuch as more immediately affect their property. Of which there are two, which are attended with a breach of the peace; *larciny*, and *malicious miſchief*: and one, that is equally injurious to the rights of property, but attended with no act of violence; which is the crime of *forgery*. Of theſe three in their order.

I. LARCINY, or *theft*, by contraction for latrociny, *latrocinium*, is diſtinguiſhed by the law into two ſorts; the one called *ſimple* larciny, or plain theft unaccompanied with any other atrocious circumſtance; and *mixed* or *compound* larciny, which alſo includes in it the aggravation of a taking from one's houſe or perſon.

AND, firſt, of *ſimple* larciny: which, when it is the ſtealing of goods above the value of twelvepence, is called *grand* larciny; when of goods to that value, or under, is *petit* larciny: offences, which are conſiderably diſtinguiſhed in their puniſhment, but not otherwiſe. I ſhall therefore firſt conſider the nature of ſimple larciny in general; and then ſhall obſerve the different degrees of puniſhment inflicted on its two ſeveral branches.

SIMPLE larciny then is "the felonious taking, and carrying away, of the perſonal goods of another." This offence

fence certainly commenced then, whenever it was, that the bounds of property, or laws of *meum* and *tuum*, were eſtabliſhed. How far ſuch an offence can exiſt in a ſtate of nature, where all things are held to be common, is a queſtion that may be ſolved with very little difficulty. The diſturbance of any individual, in the occupation of what he has ſeiſed to his preſent uſe, ſeems to be the only offence of this kind incident to ſuch a ſtate. But, unqueſtionably, in ſocial communities, when property is eſtabliſhed, the neceſſity whereof we have formerly ſeen [a], any violation of that property is ſubject to be puniſhed by the laws of ſociety: though how far that puniſhment ſhould extend, is matter of conſiderable doubt. At preſent we will examine the nature of theft, or larciny, as laid down in the foregoing definition.

1. IT muſt be a *taking*. This implies the conſent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon truſt, can ground a larciny. As if A lends B a horſe, and he rides away with him; or, if I ſend goods by a carrier, and he carries them away; theſe are no larcinies [b] (1). But if the carrier opens

[a] See Vol. II. pag. 8, &c. [b] 1 Hal. P. C. 504.

(1) But it is now fully eſtabliſhed, that in all caſes where horſes or carriages are hired and are never returned, if the jury are of opinion from the circumſtances that the perſons to whom they are delivered intended at the time of hiring never to reſtore them, or that the intention to ſteal them or convert them to their own uſe exiſted in their minds at the time they gained poſſeſſion, they are guilty of felony. *Pear's caſe*, and *Major Semple's caſe*, *Leach*, 189 & 327. And where a perſon hires a horſe for a particular time, or to go a ſpecific journey, and after complying with the terms of the ſpecial agreement ſells it, his poſſeſſion being then unſupported by any privity of contract or conſent of the owner, he is held to be guilty of felony. *Ib.* And it is now generally held, that if the poſſeſſion of property is obtained by any contrivance *animo furandi*, as by pretending to find a valuable ring, cutting cards, or laying wagers, or by undertaking to exchange a note into caſh, or gold into ſilver, it amounts to felony. See the reſpective caſes of *Patch*, *Horner*, and *Aickles*, in *Leach*, 206. 226. 239.

But

a bale or pack of goods, or pierces a veſſel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, theſe are larcinies [c]: for here the *animus furandi* is manifeſt; ſince in the firſt caſe he had otherwiſe no inducement to open the goods, and in the ſecond the truſt was determined, the delivery having taken its effect (2). But bare non-delivery ſhall not of courſe be intended to ariſe from a felonious deſign; ſince that may happen from a variety of other accidents. Neither by the common law was it larciny in any ſervant to run away with the goods committed to him to keep, but only a breach of civil truſt (3). But by ſtatute 33 Hen. VI. c. 1. the ſervants

[c] 3 Inſt. 107.

But where the ſale of a horſe or any other article is complete, and poſſeſſion is delivered to the buyer, who rides away with the horſe, or carries off the article, without paying for it, no felony is committed. For the property as well as poſſeſſion is in that caſe parted with, and the owner is defrauded not of the horſe or article, but only of it's price, and he has his remedy by an action to recover it. *Harvey's caſe*, *Leach*, 528.

(2) It has been decided, that if a parcel is left by accident in a hackney coach, and the coachman inſtead of reſtoring it to the owner, opens it and embezzles part of it's contents, he is guilty of larciny. *Wynne's caſe*, *Leach*, 320.

(3) In moſt caſes the judges had determined that the property of the maſter delivered by him into the charge and care of the ſervant ſtill remained in the poſſeſſion of the maſter, and if it was embezzled by the ſervant or converted to his uſe, he was guilty of felony. But to remove doubts which had exiſted reſpecting embezzlements by merchants' and bankers' clerks, it was enacted by the 39 Geo. III. c. 85. that if any ſervant or clerk ſhould by virtue of his employment receive any money, bills, or any valuable ſecurity, goods, or effects, in the name, or on the account, of his maſter or employer, and ſhould afterwards embezzle any part of the ſame, he ſhall be deemed to have feloniouſly ſtolen the ſame, and ſhould be ſubject to tranſportation for any term not exceeding fourteen years.

When

of perſons deceaſed, accuſed of embezzling their maſter's goods, may by writ out of chancery (iſſued by the advice of
[231] the chief juſtices and chief baron, or any two of them) and proclamation made thereupon, be ſummoned to appear perſonally in the court of king's bench, to anſwer their maſter's executors in any civil ſuit for ſuch goods; and ſhall, on default of appearance, be attainted of felony. And by ſtatute 21 Hen. VIII. c. 7. if any ſervant embezzles his maſter's goods to the value of forty ſhillings, it is made felony; except in apprentices, and ſervants under eighteen years old. But if he had not the poſſeſſion, but only the care and overſight of the goods, as the butler of the plate, the ſhepherd of ſheep, and the like, the embezzling of them is felony at common law [d]. So if a gueſt robs his inn or tavern of a piece of plate, it is larciny; for he hath not the poſſeſſion delivered to him, but merely the uſe [e], and ſo it is declared to be by ſtatute 3 & 4 W. & M. c. 9 if a lodger runs away with the goods from his ready furniſhed lodgings. Under ſome circumſtances alſo a man may be guilty of felony in taking his own goods: as if he ſteals them from a pawnbroker, or any one to whom he hath delivered and entruſted them, with intent to charge ſuch bailee with the value; or if he robs his own meſſenger on the road, with intent to charge the hundred with the loſs according to the ſtatute of Wincheſter [f].

2. THERE muſt not only be a taking, but a *carrying away*; *cepit et aſportavit* was the old law-latin. A bare removal from the place in which he found the goods, though the

[d] 1 Hal. P. C. 506.
[e] 1 Hawk. P. C. 90.
[f] Foſt. 123, 124.

When ſervants are convicted of robbing their maſters, as the ſecurity of families ſo much depends upon their honeſty, and as the violation of the confidence repoſed in them is a high aggravation of the crime, they are always puniſhed with the utmoſt rigour which the law admits.

thief

thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber down stairs; these have been adjudged sufficient carryings away, to constitute a larciny [g]. Or if a thief, intending to steal plate, takes it out of a chest in which it was, and lays it down upon the floor, but is surprized before he can make his escape with it; this is larciny [h] (4).

3. THIS taking, and carrying away, must also be *felonious*; that is, done *animo furandi*: or, as the civil law expresses it, *lucri causa* [i]. This requisite, besides excusing those who labour under incapacities of mind or will, (of whom we spoke sufficiently at the entrance of this book [k],) indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse, without his knowledge, and brings him home again: if a neighbour takes another's plough, that is left in the field, and uses it upon his own land, and then returns it: if, under colour of arrear of rent, where none is due, I distrein another's cattle, or seise them: all these are misdemesnors and trespasses, but no felonies [l]. [232]

[g] 3 Inst. 108, 109.
[h] 1 Hawk. P. C. 93.
[i] Inst. 4. 1. 1.
[k] See pag. 20.
[l] 1 Hal. P. C. 509.

(4) Where a man snatched an ear-ring from a lady's ear, and afterwards dropped it in her hair, it was held a sufficient carrying away to constitute a robbery. *Lapier's case*, *Leach*, 264. The removal of a parcel from one end of a waggon to the other, with an intent to steal, amounted to a larciny. *Ibid.* 204. But where a bale of goods was raised and placed upon it's end in a perpendicular posture, this was thought not to be a sufficient carrying away, there not being a complete removal from the space it before occupied. *Ibid.* And where a man was stopped and ordered by the prisoner to put down upon the ground a parcel, which he was carrying, but which the prisoner did not afterwards take up, this was held not a sufficient asportation to complete the crime of robbery. *Farrel's case*, *Ibid.* 266.

The

The ordinary discovery of a felonious intent is where the party doth it clandestinely; or, being charged with the fact, denies it. But this is by no means the only criterion of criminality: for in cases that may amount to larciny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those, which may evidence a felonious intent, or *animum furandi*: wherefore they must be left to the due and attentive consideration of the court and jury.

4. THIS felonious taking and carrying away must be *of the personal goods of another*: for if they are things *real*, or savour of the realty, larciny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, no larciny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate; and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immoveable [m]. [233] And if they were severed by violence, so as to be changed into moveables; and at the same time, by one and the same continued act, carried off by the person who severed them; they could never be said to be taken *from* the *proprietor*, in this their newly acquired state of mobility, (which is essential to the nature of larciny,) being never, as such, in the actual or constructive possession of any one, but of him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are

[m] See Vol. II. p. 16.

converted

converted into perſonal chattels, in the conſtructive poſſeſſion of him on whoſe ſoil they are left or laid; and come again at *another* time, when they are ſo turned into perſonalty, and takes them away; it is larciny: and ſo it is, if the owner, or any one elſe, has ſevered them [n]. And now, by the ſtatute 4 Geo. II. c. 42. to ſteal, or rip, cut or break, with intent to ſteal, any lead, or iron bar, rail, gate, or paliſado, fixed to a dwelling-houſe or out-houſe, or in any court or garden thereunto belonging, or to any other building, is made felony, liable to tranſportion for ſeven years; and to ſteal, damage, or deſtroy underwood or hedges, and the like, to rob orchards or gardens of fruit growing therein, to ſteal or otherwiſe deſtroy any turnips, potatoes, cabbages, parſnips, peaſe, or carrots, or the roots of madder when growing, are [o] puniſhable criminally, by whipping, ſmall fines, impriſonment, and ſatisfaction to the party wronged, according to the nature of the offence (5). Moreover, the ſtealing by night of any trees, or of any roots, ſhrubs, or plants to the value of 5 *s.* is by ſtatute 6 Geo. III. c. 36. made felony in the principals, aiders, and abettors, and in the purchaſers thereof, knowing the ſame to be ſtolen: and by ſtatutes 6 Geo. III. c. 48. and 13 Geo. III. c. 33. the ſtealing of any timber trees therein ſpecified [p], and of any root, ſhrub, or plant, by day or night, is liable to pe- [234] cuniary penalties for the two firſt offences, and for the third is conſtituted a felony liable to tranſportation for ſeven years. Stealing ore out of mines is alſo no larciny, upon the ſame principle of adherence to the freehold; with an exception only to mines of black lead, the ſtealing of ore out of which, or entering the ſame with intent to ſteal, is

[n] 3 Inſt. 109. 1 Hal. P. C. 510.

[o] Stat. 43 Eliz. c. 7. 15 Car. II. c. 2. 31 Geo. II. c. 35. 6 Geo. III. c. 48. 9 Geo. III. c. 41. 13 Geo. III. c. 32.

[p] Oak, beech, cheſnut, walnut, aſh, elm, cedar, fir, aſp, lime, ſycamore, birch, poplar, alder, larch, maple, and hornbeam.

(5) Or may be fined any ſum not exceeding twenty ſhillings, over and above the value of the goods, by 42 Geo. III. c. 67.

felony, punishable with imprisonment and whipping, or transportation not exceeding seven years; and to escape from such imprisonment, or return from such transportation, is felony without benefit of clergy, by statute 25 Geo. II. c. 10. Upon nearly the same principle the stealing of writings relating to a real estate is no felony, but a trespass [q]: because they concern the land, or (according to our technical language) *savour* of the *realty*, and are considered as part of it by the law; so that they descend to the heir together with the land which they concern [r].

BONDS, bills, and notes, which concern mere *choses in action*, were also at the common law held not to be such goods whereof larciny might be committed; being of no intrinsic value [s], and not importing any property in *possession* of the person from whom they are taken. But by the statute 2 Geo. II. c. 25. they are now put upon the same footing, with respect to larcinies, as the money they were meant to secure (6). By statute 15 Geo. II. c. 13. officers

[q] 1 Hal. P. C. 510. Stra. 1137. [s] 8 Rep. 33.
[r] See Vol. II. pag. 438.

(6) The statute declares, that if any one shall steal or take by robbery any of the *choses in action* therein specified, he shall be guilty of felony of the same nature as if he had stolen or taken by robbery goods of the same value with the money due on such *choses in action*, and remaining unsatisfied. Hence it is not a robbery to compel a person to sign a note for the payment of money, for nothing is there taken upon which money is due. *Mrs. Phipoe's case*, *Leach*, 774. So lord Ellenborough, at Carlisle 1802, held it was not felony under this statute to steal bankers' notes, which were completely executed, but which had never been put in circulation, because no money was due upon them.

It is thought that stealing a pound or other note cannot be reduced to petty larciny, as it would be inconsistent with the words of the statute to state it's value under a shilling, or less than the sum due upon it. Therefore this species of felony cannot be tried at the quarter sessions, where indictments for petty larciny only ought to be preferred.

or ſervants of the bank of England, ſecreting or embezzling any note, bill, warrant, bond, deed, ſecurity, money, or effects, intruſted with them or with the company, are guilty of felony without benefit of clergy. The ſame is enacted by ſtatute 24 Geo. II. c. 11. with reſpect to officers and ſervants of the ſouth-ſea company. And, by ſtatute 7 Geo. III. c. 50. if any officer or ſervant of the poſt-office ſhall ſecrete, embezzle, or deſtroy any letter or pacquet, containing any bank note or other valuable paper particularly ſpecified in the act, or ſhall ſteal the ſame out of any letter or pacquet, he ſhall be guilty of felony without benefit of clergy (5). Or, if he ſhall deſtroy any letter or pacquet with which he has received money for the poſtage, or ſhall [235] advance the rate of poſtage on any letter or packet ſent by the poſt, and ſhall ſecrete the money received by ſuch advancement, he ſhall be guilty of ſingle felony. Larciny alſo could not at common law be committed of treaſure-trove, or wreck, till ſeized by the king or him who hath the franchiſe: for till ſuch ſeiſure no one hath a determinate property therein. But, by ſtatute 26 Geo. II. c. 19. plundering or ſtealing from any ſhip in diſtreſs (whether wreck or no wreck) is felony without benefit of clergy: in like manner, as, by the civil law [s], this inhumanity is puniſhed in the ſame degree as the moſt atrocious theft.

LARCINY alſo cannot be committed of ſuch animals, in which there is no property either abſolute or qualified; as of beaſts that are *ferae naturae*, and unreclaimed, ſuch as deer, hares, and conies, in a foreſt, chace, or warren; fiſh, in an open river or pond; or wild fowls at their natural liberty [t]. But if they are reclaimed or confined, and may ſerve

[s] *Cod.* 6. 2. 18. [t] 1 Hal. P. C. 511. Foſt. 366.

(5) To ſecrete a letter containing money, is not an offence within this ſtatute, but will be a ſimple larceny, or a larceny in a dwelling-houſe, according to the circumſtances of the caſe. *Skutt's caſe*, *Leach*, 100.

for food, it is otherwise, even at common law: for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larciny may be committed [u]. And now, by statute 9 Geo. I. c. 22. to hunt, wound, kill, or steal any deer; to rob a warren; or to steal fish from a river or pond (being in these cases armed and disguised); also to hunt, wound, kill, or steal any deer, in the king's forests or chases inclosed, or in any other inclosed place where deer have been usually kept; or by gift or promise of reward to procure any person to join them in such unlawful act; all these are felonies without benefit of clergy. And the statute 16 Geo. III. c. 30. enacts that every unauthorized person, his aiders and abettors, who shall course, hunt, shoot at, or otherwise attempt to kill, wound, or destroy any red or fallow deer in *any* forest, chase, purlieu, or antient walk, or in any *inclosed* park, paddock, wood, or other ground, [236] where deer are usually kept, shall forfeit the sum of 20*l.* or for every deer actually killed, wounded, destroyed, taken in any toyl or snare, or carried away, the sum of 30*l.* or double those sums in case the offender be a keeper: and, upon a second offence, (whether of the same or a different species,) shall be guilty of felony, and transportable for seven years. Which latter punishment is likewise inflicted on all persons armed with offensive weapons, who shall come into such places with an intent to commit any of the said offences, and shall there unlawfully beat or wound any of the keepers in the execution of their offices, or shall attempt to rescue any person from their custody. Also by statute 5 Geo. III. c. 14. the penalty of transportation for seven years is inflicted on persons stealing or taking fish in any water within a park, paddock, garden, orchard, or yard: and on the receivers, aiders, and abettors: and the like punishment, or whipping, fine, or imprisonment, is provided for the taking or killing of conies [v] by night in open warrens: and a forfeiture of five pounds, to the owner of the fishery, is made payable by persons taking or destroying (or *attempting* so to

[u] 1 Hawk. P. C. 94. 1 Hal. P. C. 511. [v] See Stat. 22 & 23 Car. II. c. 25.

do) any fish in any river or other water within any inclosed ground, being private property. Stealing hawks, in disobedience to the rules prescribed by the statute 37 Edw. III. c. 19. is also felony[w]. It is also said[x] that, if swans be lawfully marked, it is felony to steal them, though at large in a public river; and that it is likewise felony to steal them, though unmarked, if in any private river or pond; otherwise it is only a trespass. But of all valuable domestic animals, as horses and other beasts of draught, and of all animals *domitae naturae*, which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool[y], larciny may be committed; and also of the flesh of such as are either *domitae* or *ferae naturae*, when killed[z]. As to those animals, which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them[a], yet they are not of such estimation, as that the crime of stealing them amounts to larciny[b]. But by statute 10 Geo. III. c. 18. very high pecuniary penalties, or a long imprisonment and whipping in their stead, may be inflicted by two justices of the peace, (with a very extraordinary mode of appeal to the quarter sessions,) on such as steal, or knowingly harbour a stolen *dog*, or have in their custody the skin of a dog that has been stolen[c] (6).

[w] 3 Inst. 98.
[x] Dalt. Just. c. 156.
[y] Dal. 21. Crompt. 36. 1 Hawk. P. C. 93. 1 Hal. P. C. 507. The King v. Martin, by all the judges. P. 17 Geo. III.
[z] 1 Hal. P. C. 511.
[a] See Vol. II. pag. 393.
[b] 1 Hal. P. C. 512.
[c] See the remarks in page 4. This statute hath now continued sixteen sessions of parliament unrepealed.

(6) This statute scarcely deserves the censure conveyed in the learned judge's note; for though many persons may not estimate at a high rate the intrinsic value of this kind of property, yet dogs are frequently the favourites of their owners, and few thieves who

NOTWITHSTANDING however that no larciny can be committed, unleſs there be ſome property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larciny to ſteal it; and an indictment will lie, for the goods of a perſon unknown [c]. In like manner as, among the Romans, the *lex Hoſtilia de furtis*, provided that a proſecution for theft might be carried on without the intervention of the owner [d]. This is the caſe of ſtealing a ſhroud out of a grave; which is the property of thoſe, whoever they were, that buried the deceaſed: but ſtealing the corpſe itſelf, which has no owner, (though a matter of great indecency,) is no felony, unleſs ſome of the gravecloths be
[237] ſtolen with it [e]. Very different from the law of the Franks, which ſeems to have reſpected both as equal offences; when it directed that a perſon, who had dug a corpſe out of the ground in order to ſtrip it, ſhould be baniſhed from ſociety, and no one ſuffered to relieve his wants, till the relations of the deceaſed conſented to his readmiſſion [f].

HAVING thus conſidered the general nature of ſimple larciny, I come next to treat of its *puniſhment*. Theft, by the Jewiſh law, was only puniſhed with a pecuniary fine, and ſatisfaction to the party injured [g]. And in the civil law, till

[c] 1 Hal. P. C. 512.
[d] Gravin. l. 3. § 106.
[e] See Vol. II. pag. 429.
[f] Monteſq. Sp. L. b. 30. ch. 19.
[g] Exod. c. xxii.

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are guilty of ſtealing dogs, would confine their depredations to this ſingle article. The penalty for the firſt offence is only from 20 to 30 pounds, and if paid, no further puniſhment can be inflicted. Dr. Burn ſeems to have ſuggeſted a very idle doubt, whether a man under this ſtatute can be convicted for ſtealing a bitch, as the word *dog* alone is uſed throughout the ſtatute *(tit. Dogs)*. When it is neceſſary to diſtinguiſh the ſexes, we are obliged to reſort to the word bitch, but we have no other word than *dogs* to comprize the whole canine ſpecies of both ſexes, in which ſenſe it unqueſtionably was uſed by the legiſlature in this ſtatute.

ſome

ſome very late conſtitutions, we never find the puniſhment capital. The laws of Draco at Athens puniſhed it with death: but his laws were ſaid to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct. And ſo the Attic laws in general continued [h]; except that once, in a time of dearth, it was made capital to break into a garden, and ſteal figs: but this law, and the informers againſt the offence, grew ſo odious, that from them all malicious informers were ſtyled ſycophants; a name which we have much perverted from its original meaning. From theſe examples, as well as the reaſon of the thing, many learned and ſcrupulous men have queſtioned the propriety, if not lawfulneſs, of inflicting capital puniſhment for ſimple theft [i]. And certainly the natural puniſhment for injuries to property ſeems to be the loſs of the offender's own property: which ought to be univerſally the caſe, were all men's fortune's equal. But as thoſe, who have no property themſelves, are generally the moſt ready to attack the property of others, it has been found neceſſary inſtead of a pecuniary to ſubſtitute a corporal puniſhment; yet how far this corporal puniſhment ought to extend, is what has occaſioned the doubt. Sir Thomas More [j], and the marquis Beccaria [k], at the diſtance of more than two centuries from each other, have very ſenſibly propoſed that kind of corporal puniſhment, which approaches the neareſt to a pecuniary ſatisfaction; *viz.* a temporary impriſonment, with an obligation to labour, firſt for the party robbed, and afterwards for the public, in works of the moſt ſlaviſh kind: in order to oblige the offender to repair, by his [238]

[h] Petit. *LL. Attic. l. 7. tit. 5.*

[i] *Eſt enim ad vindicanda furta nimis atrox, nec tamen ad refraenanda ſufficiens: quippe neque furtum ſimplex tam ingens facinus eſt, ut capite debeat plecti; neque ulla poena eſt tanta, ut ab latrociniis cohibeat eos, qui nullam aliam artem quaerendi victus habent.* (More *Utopia. edit. Glaſg.* 1750. *pag.* 21.)—*Denique, cum lex Moſaica, quanquam inclemens et aſpera, tamen pecunia furtum, haud morte, mulctavit; ne putemus Deum, in nova lege clementiae qua pater imperat filiis, majorem indulſiſſe nobis invicem faciendi licentiam. Haec ſunt cur non licere putem: quam vero ſit abſurdum, atque etiam perniciofum reipublicae, furem atque homicidam ex aequo puniri, nemo eſt (opinor) qui neſciat.* (*Ibid.* 39.)

[j] *Utop. pag.* 42.

[k] ch. 22.

induſtry and diligence, the depredations he has committed upon private property and public order. But notwithſtanding all the remonſtrances of ſpeculative politicians and moraliſts, the puniſhment of theft ſtill continues, throughout the greateſt part of Europe, to be capital: and Puffendorf [l], together with ſir Matthew Hale [m], are of opinion that this muſt always be referred to the prudence of the legiſlature; who are to judge, ſay they, when crimes are become ſo enormous as to require ſuch ſanguinary reſtrictions [n]. Yet both theſe writers agree, that ſuch puniſhment ſhould be cautiouſly inflicted, and never without the utmoſt neceſſity.

OUR antient Saxon laws nominally puniſhed theft with death, if above the value of twelvepence: but the criminal was permitted to redeem his life by a pecuniary ranſom; as, among their anceſtors the Germans, by a ſtated number of cattle [o]. But in the ninth year of Henry the firſt, this power of redemption was taken away, and all perſons guilty of larciny above the value of twelvepence were directed to be hanged; which law continues in force to this day [p]. For though the inferior ſpecies of theft, or petit larciny, is only puniſhed by impriſonment or whipping at common law [q], or by ſtatute 4 Geo. I. c. 11. may be extended to tranſportation for ſeven years, as is alſo expreſsly directed in the caſe of the plate-glaſs company [r], yet the puniſhment of grand
[239] larciny, or the ſtealing above the value of twelvepence, (which ſum was the ſtandard in the time of king Athelſtan, eight hundred years ago,) is at common law regularly death. Which, conſidering the great intermediate alteration [s] in the price or denomination of money, is undoubtedly a very

[l] L. of N. b. 8. c. 3.
[m] 1 Hal. P. C. 13.
[n] See pag. 9.
[o] Tac. *de mor. Germ.* c. 12.
[p] 1 Hal. P. C. 12. 3 Inſt. 53.
[q] 3 Inſt. 218.
[r] Stat. 13 Geo. III. c. 38.
[s] In the reign of king Henry I. the ſtated value at the exchequer, of a paſture fed ox was one ſhilling: (*Dial. de Scacc. l.* 1. § 7.) which if we ſhould even ſuppoſe to mean the *ſolidus legalis* mentioned by Lyndewode (*Prov. l.* 3. *c.* 13. See Vol. II. page 509.) or the 72d part of a pound of gold, is only equal to 13 *s.* 4 *d.* of the preſent ſtandard.
[t] *Gloſſ.* 350.

rigorous

rigorous conſtitution; and made ſir Henry Spelman (above a century ſince, when money was at twice it's preſent rate) complain, that while every thing elſe was riſen in it's nominal value, and become dearer, the life of man had continually grown cheaper[t]. It is true, that the mercy of juries will often make them ſtrain a point, and bring in larciny to be under the value of twelvepence, when it is really of much greater value (7): but this, though evidently juſtifiable and proper, when it only reduces the preſent nominal value of money to the antient ſtandard [u], is otherwiſe a kind of pious perjury, and does not at all excuſe our common law in this reſpect from the imputation of ſeverity, but rather ſtrongly confeſſes the charge. It is likewiſe true, that by the merciful extenſions of the benefit of clergy by our modern ſtatute law, a perſon who commits a ſimple larciny to the value of thirteen pence or thirteen hundred pounds, though guilty of a capital offence, ſhall be excuſed the pains of death: but this is only for the firſt offence. And in many caſes of ſimple larciny the benefit of clergy is taken away by ſtatute: as from horſeſtealing in the principals, and acceſſories both *before* and *after* the fact [w]; theft by great and notorious thieves in Northumberland and Cumberland [x]; taking woollen cloth from off the tenters [y], or linens, fuſtians, calli- [240]

[t] *Gloſſ.* 350.

[u] 2 Inſt. 189.

[w] Stat. 1. Edw. VI. c. 12. 2 & 3 Edw. VI. c. 33. 31 Eliz. c. 12.

[x] Stat. 18 Car. II. c. 3.

[y] Stat. 22 Car. II. c. 5. But, as it ſometimes is difficult to prove the identity of the goods ſo ſtolen, the *onus probandi* with reſpect to innocence is now by ſtatute 15 Geo. II. c. 27. thrown on the perſons in whoſe cuſtody ſuch goods are found: the failure whereof is, for the firſt time, a miſdemeſnor puniſhable by forfeiture of the treble value; for the ſecond, by impriſonment alſo; and the third time it becomes a felony, puniſhed with tranſportation for ſeven years.

(7) In a proſecution for a ſimple larceny, in general, it is not very material to the priſoner, whether he is convicted of grand or petty larceny, as the court can tranſport for both. But upon a ſecond conviction for grand larceny, he may be deprived of the benefit of clergy.

coes, or cotton goods, from the place of manufacture [z] (8); (which extends, in the laſt caſe, to aiders, aſſiſters, procurers, buyers, and receivers;) felonioufly driving away, or otherwiſe ſtealing one or more ſheep or other cattle ſpecified in the acts (9), or killing them with intent to ſteal the whole or any part of the carcaſe [a]; or aiding or aſſiſting therein; thefts on navigable rivers above the value of forty ſhillings [b], or being preſent, aiding, and aſſiſting thereat; plundering veſſels in diſtreſs, or that have ſuffered ſhipwreck [c]; ſtealing letters ſent by the poſt [d]; and alſo ſtealing deer, fiſh, hares, and conies under the peculiar circumſtances mentioned in the Waltham black act [e]. Which additional ſeverity is owing to the great malice and miſchief of the theft in ſome of theſe inſtances; and, in others, to the difficulties men would otherwiſe lie under to preſerve thoſe goods, which are ſo eaſily carried off. Upon which laſt principle the Roman law puniſhed more ſeverely than other thieves

[z] Stat. 18 Geo. II. c. 27. Note, in the three laſt caſes an option is given to the judge to tranſport the offender; for *life* in the firſt caſe, for *ſeven years* in the ſecond, and for *fourteen years* in the third;—in the firſt and third caſes *inſtead of* ſentence of death, in the ſecond *after* ſentence is given.

[a] Stat 14 Geo. II. c. 6. 15 Geo. II. c. 34. See vol. I. pag. 88.

[b] Stat. 24 Geo. II. c. 45.

[c] Stat. 12 Ann. ſt. 2. c. 18. 26 Geo. II. c. 19.

[d] Stat. 7 Geo. III. c. 50.

[e] Stat. 9 Geo. I. c. 22.

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(8) J. Hugill was indicted at York for ſtealing yarn out of a bleaching ground. The evidence was, that the yarn had been ſpread upon the ground, but it was taken up and thrown into heaps in order to be carried into the houſe, and in that ſtate ſome of it was ſtolen by the priſoner. Mr. Baron Thompſon held this theft was not within the ſtatute for the protection of bleaching grounds, as there was no occaſion to leave it on the ground in that ſtate.

(9) The cattle ſpecified are horned cattle of every deſcription; and the benefit of clergy has not yet been taken away from the ſimple ſtealing of mules, aſſes, or ſwine.

the

the *abigei*, or ſtealers of cattle [f]; and the *balnearii*, or ſuch as ſtole the cloaths of perſons who were waſhing in the public baths [g]; both which conſtitutions ſeem to be borrowed from the laws of Athens [h]. And ſo too the antient Goths puniſhed with unrelenting ſeverity thefts of cattle, or corn that was reaped and left in the field: ſuch kind of property (which no human induſtry can ſufficiently guard) being eſteemed under the peculiar cuſtody of heaven [i]. And thus much for the offence of *ſimple* larciny.

MIXED, or *compound* larciny is ſuch as has all the properties of the former, but is accompanied with either one, or both, of the aggravations of a taking from one's *houſe* or *perſon*. Firſt therefore of larciny from the *houſe*, and then of larciny from the *perſon*.

1. LARCINY from the *houſe*, though it ſeems (from the conſiderations mentioned in the preceding chapter [j]) to have a higher degree of guilt than ſimple larciny, yet is not at all diſtinguiſhed from the other at common law [k]: unleſs where it is accompanied with the circumſtance of breaking the houſe by night; and then we have ſeen that it falls under another deſcription, *viz.* that of burglary. But now by ſeveral acts of parliament (the hiſtory of which is very ingeniouſly deduced by a learned modern writer [l], who hath ſhewn them to have gradually ariſen from our improvements in trade and opulence) the benefit of clergy is taken from larcinies committed in an houſe in almoſt every inſtance; except that larciny of the ſtock or utenſils of the plate-glaſs company from any of their houſes, &c. is made only ſingle felony, and liable to tranſportation for ſeven years [m]. The multiplicity of the general acts is apt to create ſome confuſion; but upon comparing them diligently we may collect, that the benefit of clergy is denied upon [241]

[f] *Ff.* 47. *t.* 14.
[g] *Ibid. t.* 17.
[h] Pott. Antiq. b. 1. c. 26.
[i] Stiernh. *de jure Goth. l.* 3. c. 5.
[j] See pag. 223.
[k] 1 Hawk. P. C. 98.
[l] Barr. 375, &c.
[m] Stat. 13 Geo. III. c. 38.

the following domeſtic aggravations of larciny; *viz.* Firſt, in larcinies *above the value of twelvepence*, committed, 1. In a church or chapel, with or without violence, or breaking the ſame [n]: 2. In a booth or tent in a market or fair, in the day time or in the night, by violence or breaking the ſame; the owner or ſome of his family being therein [o]: 3. By robbing a dwelling-houſe in the day time (which *robbing* implies a breaking) any perſon being therein [p]: 4. In a dwelling-houſe by day or by night, without breaking the ſame, any perſon being therein and put in fear [q]: which amounts in law to a robbery: and in both theſe laſt caſes the acceſſory before the fact is alſo excluded from his clergy. Secondly, in larcinies *to the value of five ſhillings*, committed, 1. By breaking any dwelling-houſe, or any out-houſe, ſhop, or warehouſe thereunto belonging in the day time, although no perſon be therein [r]; which alſo now extends to aiders,
[242] abettors, and acceſſories before the fact [s]: 2. By privately ſtealing goods, wares, or merchandize in any ſhop, warehouſe [t], coachhouſe or ſtable, by day or by night; though the ſame be not broken open, and though no perſon be therein [u]: which likewiſe extends to ſuch as aſſiſt, hire, or command the offence to be committed (10). Laſtly, in

[n] Stat. 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12. 1 Hal. P. C. 518.
[o] Stat. 5 & 6 Edw. VI c. 9. 1 Hal. P. C. 522.
[p] Stat. 3 & 4 W. & M. c. 9.
[q] *Ibid.*
[r] Stat 39 Eliz. c. 15.
[s] Stat. 3 & 4 W. & M. c. 9.
[t] See Foſter. 78. Barr. 379.
[u] Stat. 10 & 11 W. III. c. 23.

(10) It has been held that privately ſtealing money to the amount of five ſhillings, is not within the ſtatute 10 & 11 W. 3. c. 23. Shops and warehouſes when they are uſed merely as repoſitories of goods, and not as places of ſale, are not within the act, and conſequently a priſoner cannot be convicted of privately ſtealing in a ſhop an article, which is not expoſed there for ſale, but which happens to be left there to be repaired, or for ſome other ſimilar purpoſe. And with regard to coach-houſes and ſtables, the articles muſt be ſuch as are generally depoſited there. *Poſt.* 78. *Leach*, 43. 235. 248. 274.—In proſecutions under this ſtatute,

larcinies *to the value of forty ſhillings* in a dwelling houſe, or its out-houſes, although the ſame be not broken, and whether any perſon be therein or no; unleſs committed againſt their maſters by apprentices under the age of fifteen [r]. This alſo extends to thoſe, who aid or aſſiſt in the commiſſion of any ſuch offence (11).

2. LARCINY from the *perſon* is either by *privately* ſtealing; or by open and violent aſſault, which is uſually called *robbery*.

THE offence of *privately* ſtealing from a man's *perſon*, as by picking his pocket or the like, privily without his know-

[r] Stat. 12 Ann. ſtat. 1. c. 7.

ſtatute, it is held not to be privately ſtealing if any perſon whatever ſee or perceive the theft at the time it is committed. And where there are ſeveral ſhopmen employed in a ſhop, they muſt appear at the trial to prove they did not perceive the theft, or the judge will direct the jury to preſume that the ſtealing was not done privately.

(11) A perſon cannot be convicted capitally for ſtealing to the value of 40*s.* in his own houſe, nor a wife in her huſband's houſe. *Thompſon's caſe*, *Leach*, 277. Upon an indictment for burglariouſly breaking and entering a dwelling-houſe, and ſtealing therein property to the value of 40*s.* the priſoner may be acquitted of the breaking, and be capitally convicted of ſtealing in the dwelling-houſe. *Withal's caſe*, *Ib.* 83.

If property is ſtolen immediately from the perſon of any one in a houſe, it is not within this ſtatute, the judges having determined that the ſtatute was made to protect ſuch property as might be depoſited in the houſe, and not that which was on the perſon of the party. *Campbell's and Owen's caſes*, *Leach*, 642. 652.

Stealing bank notes to the amount of 40*s.* in a dwelling-houſe is a capital crime under this ſtatute; the 2 Geo. II. c. 25. having made the ſtealing of bank notes and other choſes in action therein mentioned, a felony of the ſame nature, as ſtealing other property of the value of the money due upon the note. *Dean's caſe*, *Leach*, 798.

lege,

, was debarred of the benefit of clergy, ſo early as by the ſtatute 8 Eliz. c. 4. But then it muſt be ſuch a larciny, as ſtands in need of the benefit of clergy, *viz.* of above the value of twelvepence; elſe the offender ſhall not have judgment of death. For the ſtatute creates no new offence; but only prevents the priſoner from praying the benefit of clergy, and leaves him to the regular judgment of the antient law [w]. This ſeverity (for a moſt ſevere law it certainly is) ſeems to be owing to the eaſe with which ſuch offences are committed, the difficulty of guarding againſt them, and the boldneſs with which they were practiſed (even in the queen's court and preſence) at the time when this ſtatute was made: beſides that this is an infringement of property, in the manual occupation or corporal poſſeſſion of the owner, which was an offence even in a ſtate of nature. And therefore the *ſaccularii*, or cutpurſes, were more ſeverely puniſhed than common thieves by the Roman and Athenian laws [x] (12).

[w] 1 Hawk. P. C. 98. The like obſervatio will certainly hold in the caſes of horſeſtealing, (1 Hal. P. C. 531.) theſts in Northumberland and Cumberland, and ſtealing woollen cloth from the tenters; and poſſibly in ſuch other caſes where it is provided by any ſtatute that ſimple larciny, under certain circumſtances, ſhall be felony without benefit of clergy.

[x] *Ff.* 47. 11. 7. Pott. Antiq. l. 1. c. 26.

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(12) It had been held that this ſtatute was only meant to protect perſons, who were obliged to go into public aſſemblies, as churches, courts, and markets, and whoſe perſons thereby became expoſed to the attempts of pickpockets, and that it did not apply to perſons who loſt their property when they were aſleep. But this diſtinction has been determined to be unfounded by a deciſion of the judges, and there have ſince been ſeveral capital convictions for ſtealing privately from perſons aſleep. *Willan's caſe, Leach*, 393.

But the judges ſtill hold that it does not extend to perſons, who by intoxication have expoſed themſelves to the dangers of depredation, by deſtroying thoſe faculties of the mind, by the exertion of which the larciny might probably have been prevented. *Gribble's and Kennedy's caſes, Leach*, 275 & 915.

It

OPEN and violent larciny from the *perſon*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking, from the perſon of another, of goods or money to any value, by violence or putting him in fear[y]. 1. There muſt be a taking, otherwiſe it is no robbery. A mere attempt to rob was indeed held to be felony, ſo late as Henry the fourth's time[z]: but afterwards it was taken to be only a miſdemeſnor, and puniſhable with fine and impriſonment; till the ſtatute 7 Geo. II. c. 21. which makes it a felony (tranſportable for ſeven years) unlawfully and maliciouſly to aſſault another, with any offenſive weapon or inſtrument;—or by menaces, or by other forcible or violent manner, to demand any money or goods;—with a felonious intent to rob. If the thief, having once taken a purſe, returns it, ſtill it is a robbery; and ſo it is, whether the taking be ſtrictly from the perſon of another, or in his preſence only: as, where a robber by menaces and violence puts a man in fear, and drives away his ſheep or his cattle before his face[a]. But if the taking be not either directly from his perſon, or in his preſence, it is no robbery[b]. 2. It is immaterial of what

[y] 1 Hawk. P. C. 95.
[z] 1 Hal. P. C. 532.
[a] 1 Hal. P. C. 533.
[b] Comyns, 478. Stra. 1015.

It uſed to be held that no one could be convicted capitally of privately ſtealing from the perſon, if the theft was perceived by any one at the time, as the caſe of privately ſtealing in a ſhop; but the words of the 8 Eliz. c. 4. are the felonious taking from the perſon of another *privily without his knowledge*, the fair conſtruction of which is, that it is capital to ſteal privily without the knowledge of the owner of the property, though the theft may be obſerved at the time by others. And this conſtruction is now adopted by the judges.

This ſtatute is ſilent reſpecting aiders and abettors, it has therefore been determined that only the principal in the firſt degree, or the hand who takes the property, can be guilty of privately ſtealing from the perſon; if therefore two or more are concerned in the theft, and it cannot be aſcertained which of them actually took the property, they muſt all be acquitted of this capital part of the charge. *Innis's caſe*, *Leach* 7. and *Murphy's caſe*, *Ibid.* 302.

value

value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery [c]. 3. Laſtly, the taking muſt be by force, or a previous putting in fear; which makes the violation of the perſon more atrocious than privately ſtealing. For, according to the maxim of the civil law [d], "*qui vi rapuit, fur improbior eſſe videtur.*" This previous violence, or putting in fear, is the criterion that diſtinguiſhes robbery from other larcinies. For if one privately ſteals ſixpence from the perſon of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is ſubſequent [e]: neither is it capital, as privately ſtealing, being under the value of twelvepence. Not that it is indeed neceſſary, though uſual, to lay in the indictment that the robbery was committed by *putting in fear*; it is ſufficient, if laid to be done by *violence* [f]. And when it is laid to be done by putting in fear, this does not imply any great
[244] degree of terror or affright in the party robbed: it is enough that ſo much force, or threatening by word or geſture, be uſed, as might create an apprehenſion of danger, or induce a man to part with his property without or againſt his conſent [g] (13). Thus, if a man be knocked down without previous warning, and ſtripped of his property while ſenſeleſs, though ſtrictly he cannot be ſaid to be *put in fear*, yet this is undoubtedly a robbery. Or, if a perſon with a ſword drawn begs an alms, and I give it him through miſtruſt and apprehenſion of violence, this is a felonious robbery [h]. So if,

[c] 1 Hawk. P. C. 97.
[d] *Ff.* 4. 2. 14 § 12.
[e] 1 Hal. P. C. 534.
[f] Trin. 3 Ann. by all the judges.
[g] Foſt. 128.
[h] 1 Hawk. P. C. 96.

(13) Mr. J. Aſhhurſt is reported to have thus expreſſed himſelf in delivering the opinion of the judges in Willan's caſe, *Leach*, 232. "The true definition of robbery is the ſtealing, or taking from "the perſon, or in the preſence of another, property of any "amount, with ſuch a degree of *force* or *terror*, as to induce the "party *unwillingly* to part with his property; and whether the "terror ariſes from real or expected violence to the perſon,

"or

under a pretence of ſale, a man forcibly extorts money from another, neither ſhall this ſubterfuge avail him. But it is doubted [i], whether the forcing a higler, or other chapman, to ſell his wares, and giving him the full value of them, amounts to ſo heinous a crime as robbery (14).

THIS ſpecies of larciny is debarred of the benefit of clergy by ſtatute 23 Hen. VIII. c. 1. and other ſubſequent ſtatutes; not indeed in general, but only when committed in a dwelling-houſe, or in or near the king's highway. A robbery therefore in a diſtant field, or foot-path, was not puniſhed with death [k]; but was open to the benefit of clergy, till the ſtatute 3 & 4 W. & M. c. 9. which takes away clergy from both principals and acceſſories before the fact, in robbery, whereſoever committed (15).

[i] 1 Hawk. P. C. 97. [k] 1 Hal. P. C. 535.

"or from a ſenſe of injury to the character, the law makes no "kind of difference; for to moſt men the idea of loſing their fame "and reputation is equally, if not more terrific, than the dread of "perſonal injury. The principal ingredient in robbery is a man's "being *forced* to part with his property; and the judges are una-"nimouſly of opinion, that upon the principles of law, and the "authority of former deciſions, a *threat* to accuſe a man of having "committed the greateſt of all crimes, is a ſufficient force to con-"ſtitute the crime of robbery by putting in fear."

(14) This diſtinction has been frequently admitted by the judges in proſecutions for robbery, *viz.* that if any thing is ſnatched ſuddenly from the head, hand, or perſon of any one without any ſtruggle on the part of the owner, or without any evidence of force or violence being exerted by the thief, it does not amount to robbery. But if any thing is broken or torn in conſequence of the ſudden ſeizure, it would be evidence of ſuch force as would conſtitute a robbery; as where part of a lady's hair was torn away by ſnatching a diamond pin from her head, and an ear was torn by pulling off an ear-ring, each of theſe caſes was determined to be a robbery. *Leach*, 238.

(15) By the 5 Geo. III. c. 25, and 7 Geo. III. c. 50. if any perſon ſhall rob any mail, in which letters are ſent by the poſt, of any letter,

II. MALICIOUS *miſchief*, or damage, is the next ſpecies of injury to private property, which the law conſiders as a public crime. This is ſuch as is done, not *animo furandi*, or with an intent of gaining by another's loſs; which is ſome, though a weak, excuſe: but either out of a ſpirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arſon; for as that affects the habitation, ſo this does the other property, of individuals. And therefore any damage ariſing from this miſchievous diſpoſition, though only a treſpaſs at common law, is now by
[245] a multitude of ſtatutes made penal in the higheſt degree. Of theſe I ſhall extract the contents in order of time.

AND, firſt, by ſtatute 22 Hen. VIII. c. 11. perverſely and maliciouſly to cut down or deſtroy the powdike, in the fens of Norfolk and Ely, is felony (16). And in like manner it is by many ſpecial ſtatutes, enacted upon the occaſions, made felony to deſtroy the ſeveral ſea-banks, river-banks, public navigations, and bridges, erected by virtue of thoſe acts of parliament. By ſtatute 43 Eliz. c. 13. (for preventing rapine on the northern borders) to burn any barn or ſtack of corn or grain; or to impriſon or carry away any ſubject, in order to ranſom him, or to make prey or ſpoil of his perſon or goods upon deadly feud or otherwiſe, in the four northern counties of Northumberland, Weſtmorland, Cumberland, and Durham, or being acceſſory before the fact to ſuch carrying away or impriſonment; or to give or take any money or contribution, there called *blackmail*, to ſecure ſuch goods from rapine; is felony without benefit of clergy. By ſtatute

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letter, packet, bag or mail of letters, ſuch offender ſhall be guilty of felony, without benefit of clergy; but the indictments for mail robberies are generally drawn as for common highway robberies by taking a portmanteau, or a bag of a certain value from the perſon entruſted with the carriage of the letters.

(16) By 15 Car. II. c. 17. ſ. 13. maliciouſly to cut down, or to deſtroy any works for conveying the waters of the great Bedford level, is ſubject to the ſame puniſhment.

22 & 23 Car. II. c. 7. maliciously, unlawfully, and willingly, in the night time, to burn or cause to be burnt or destroyed, any ricks or stacks of corn, hay, or grain, barns, houses, buildings, or kilns; or to kill any horses, sheep, or other cattle, is felony; but the offender may make his election to be transported for seven years; and to maim or hurt such horses, sheep, or other cattle, is a trespass, for which treble damages shall be recovered. By statute 4 & 5 W. & M. c. 23. to burn on any waste, between Candlemas and Midsummer, any grig, ling, heath, furze, gofs, or fern, is punishable with whipping and confinement in the house of correction. By statute 1 Ann. st. 2. c. 9. captains and mariners belonging to ships, and destroying the same, to the prejudice of the owners, (and by 4 Geo. I. c. 12. to the prejudice of insurers also,) are guilty of felony without benefit of clergy. And by statute 12 Ann. st. 2. c. 18. making any hole in a ship in distress, or stealing her pumps, or aiding or abetting such offence, or wilfully doing any thing tending to the immediate loss of such ship, is felony without benefit of clergy. By statute 1 Geo. I. c. 48. maliciously to set on fire any underwood, wood, or coppice, is made single felony. By [246] statute 6 Geo. I. c. 23. the wilful and malicious tearing, cutting, spoiling, burning, or defacing of the garments or cloaths of any person passing in the streets or highways, with intent so to do, is felony. This was occasioned by the insolence of certain weavers and others; who, upon the introduction of some Indian fashions prejudicial to their own manufactures, made it their practice to deface them; either by open outrage, or by privily cutting, or casting *aqua fortis* in the streets upon such as wore them. By statute 9 Geo. I. c. 22. commonly called the Waltham black act, occasioned by the devastations committed near Waltham in Hampshire, by persons in disguise or with their faces blacked; (who seem to have resembled the Roberdsmen, or followers of Robert Hood, that in the reign of Richard the first committed great outrages on the borders of England and Scotland [1];) by this black

[1] 3 Inst. 197.

act, I say, which has in part been mentioned under the several heads of riots, menaces, mayhem, and larciny [m], it is farther enacted, that to set fire to any house, barn, or out-house, (which is extended by statute 9 Geo. III. c. 29. to the malicious and wilful burning or setting fire to all kinds of mills,) or to any hovel, cock, mow, or stack of corn, straw, hay, or wood (15); or unlawfully and maliciously to break down the head of any fishpond, whereby the fish shall be lost or destroyed; or in like manner to kill, maim, or wound any cattle (16); or cut down or destroy any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, shelter, or profit; all these malicious acts, or procuring by gift or promise of reward any person to join them therein, are felonies without benefit of clergy: and the hundred shall be chargeable for the damages, unless the offender be convicted. In like manner by the Roman law, to cut down trees, and especially vines, was punished in the same degree as robbery [n]. By statutes 6 Geo. II. c. 37. and 10 Geo. II. c. 32. it is also made felony without the benefit of clergy, maliciously to cut down any river or sea-bank, whereby lands may be overflowed or damaged; or
[247] to cut any hop binds growing in a plantation of lands; or wilfully and maliciously to set on fire, or cause to be set on fire, any mine, pit, or delph of coal. By statute 11 Geo. II. c. 22. to use any violence in order to deter any person from buying corn or grain; to seize any carriage or

[m] See pag. 144. 208. 235. 240. [n] *Ff.* 47. 7. 2.

(15) As the setting fire to property of this kind, where a house or out-house was not burned, was not felony by the common law, it has been held that setting fire to *a parcel* of unthreshed wheat is not a felony, being not within the description of any articles specified in the statute. *Judd's case*, *Leach*, 381.

(16) It has frequently been determined, that to constitute a felony within the meaning of the statute, the killing or maiming must proceed from malice or revenge to the owner of the animal; and it is not sufficient if it is only the effect of a brutal disposition, or of a sudden passion conceived against the beast itself. *Shepherd's case*, *Leach*, 436.

horse

horſe carrying grain or meal to or from any market or ſea-port: or to uſe any outrage with ſuch intent; or to ſcatter, take away, ſpoil, or damage ſuch grain or meal; is puniſhed for the firſt offence with impriſonment and public whipping: and the ſecond offence, or deſtroying any granary where corn is kept for exportation, or taking away or ſpoiling any grain or meal in ſuch granary, or in any ſhip, boat, or veſſel intended for exportation, is felony, ſubject to tranſportation for ſeven years. By ſtatute 28 Geo. II. c. 19. to ſet fire to any goſs, furze, or fern, growing in any foreſt or chaſe, is ſubject to a fine of five pounds. By ſtatutes 6 Geo. III. c. 36 and 48. and 13 Geo. III. c. 33. wilfully to ſpoil or deſtroy any timber or other trees, roots, ſhrubs, or plants, is for the two firſt offences liable to pecuniary penalties; and for the third, if in the day time, and even for the firſt if at night, the offender ſhall be guilty of felony, and liable to tranſportation for ſeven years. By ſtatute 9 Geo. III. c. 29. wilfully and maliciouſly to burn or deſtroy any engine or other machines, therein ſpecified, belonging to any mine; or any fences for incloſures purſuant to any act of parliament, is made ſingle felony, and puniſhable with tranſportation for ſeven years, in the offender, his adviſers, and procurers. And by ſtatute 13 Geo. III. c. 38. the like puniſhment is inflicted on ſuch as break into any houſe, *&c.* belonging to the plate-glaſs company with intent to ſteal, cut, or deſtroy, any of their ſtock or utenſils, or ſhall wilfully and maliciouſly cut or deſtroy the ſame. And theſe are the principal puniſhments of malicious miſchief (17).

III. FORGERY, or the *crimen falſi*, is an offence, which was puniſhed by the civil law with deportation or baniſhment, and ſometimes with death [o]. It may with us be de-

[o] *Inſt.* 4. 18. 7.

(17) And by ſtatute 22 Geo. III. c. 40. if any perſon ſhall break into any houſe or ſhop with intent to cut or deſtroy any ſerge, woollen, velvet, ſilk, linen or cotton goods, in the loom, or any ſtock or utenſils uſed in manufacturing ſuch goods, he ſhall be guilty of felony without benefit of clergy.

fined (at common law) to be, "the fraudulent making or "alteration of a writing to the prejudice of another man's
[248] "right:" for which the offender may ſuffer fine, impriſonment, and pillory. And alſo, by a variety of ſtatutes, a more ſevere puniſhment is inflicted on the offender in many particular caſes, which are ſo multiplied of late as almoſt to become general. I ſhall mention the principal inſtances.

By ſtatute 5 Eliz. c. 14. to forge or make, or knowingly to publiſh or give in evidence, any forged deed, court roll, or will, with intent to affect the right of real property, either freehold or copyhold, is puniſhed by a forfeiture to the party grieved of double coſts and damages; by ſtanding in the pillory, and having both his ears cut off, and his noſtrils ſlit, and ſeared; by forfeiture to the crown of the profits of his lands, and by perpetual impriſonment. For any forgery relating to a term of years, or annuity, bond, obligation, acquittance, releaſe, or diſcharge of any debt or demand of any perſonal chattels, the ſame forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loſs of one of his ears, and a year's impriſonment: the ſecond offence in both caſes being felony without benefit of clergy.

BESIDES this general act, a multitude of others, ſince the revolution, (when paper credit was firſt eſtabliſhed,) have inflicted capital puniſhment on the forging, altering, or uttering as true, when forged, of any bank bills or notes, or other ſecurities [p]; of bills of credit iſſued from the exchequer [q]; of ſouth-ſea bonds, &c. [r]; of lottery tickets or orders [s]; of army or navy debentures [t]; of Eaſt India bonds [u]; of writings under ſeal of the London, or royal exchange aſſurance [w]; of the hand of the receiver of the pre-fines [x]; or of the accountant-general and certain other officers of the court of chancery [y]; of a letter of attorney or other power to receive or transfer ſtock or annuities; and on the per-

[p] Stat. 8 & 9 W. III. c. 20. § 36. 11 Geo. I. c. 9. 12 Geo. I. c. 32. 15 Geo. II. c. 13. 13 Geo. III. c. 79.
[q] See the ſeveral acts for iſſuing them.
[r] Stat. 9 Ann. c. 21. 6 Geo. I. c. 4 & 11. 12 Geo. I. c. 32.
[s] See the ſeveral acts for the lotteries.
[t] Stat. 5 Geo. I. c. 14. 9 Geo. I. c. 5.
[u] Stat. 12 Geo. I. c. 32.
[w] Stat. 6 Geo. I. c. 18.
[x] Stat. 32 Geo. II. c. 14.
[y] Stat. 12 Geo. I, c. 32.

ſonating

ſonating a proprietor thereof, to receive or transfer ſuch annuities, ſtock, or dividends [z]: alſo on the perſonating, or procuring to be perſonated, any ſeaman or other perſon, entitled to wages or other naval emoluments, or any of his perſonal repreſentatives; and the taking or procuring to be taken, any falſe oath in order to obtain a probate, or letters of adminiſtration, in order to receive ſuch payments; and the forging, or procuring to be forged, and likewiſe the uttering, or publiſhing, as true, of any counterfeited ſeaman's will or power [a]: to which may be added, though not ſtrictly reducible to this head, the counterfeiting of mediterranean paſſes, under the hands of the lords of the admiralty, to protect one from the piratical ſtates of Barbary [b]; the forging or imitating of any ſtamps to defraud the public revenue [c]; and the forging of any marriage regiſter or licence [d]: all which are by diſtinct acts of parliament made felonies without benefit of clergy. By ſtatutes 13 Geo. III. c. 52 & 59. forging or counterfeiting any ſtamp or mark to denote the ſtandard of gold and ſilver plate, and certain other offences of the like tendency, are puniſhed with tranſportation for fourteen years (18). By ſtatute 12 Geo. III. c. 48. certain frauds on the ſtamp-duties, therein deſcribed, principally by uſing the ſame ſtamps more than once, are made ſingle felony, and liable to tranſportation for ſeven years. And the ſame puniſhment is inflicted by ſtatute 13 Geo. III. c. 38. on ſuch as counterfeit the common ſeal of the corporation for manufacturing plate-glaſs, (thereby erected,) or knowingly demand money of the company by virtue of any writing under ſuch counterfeit ſeal (19).

[z] Stat. 8 Geo. I. c. 22. 9 Geo. I. c. 12. 31 Geo. II. c. 22. § 77.

[a] Stat. 31 Geo. II. c. 10. 9 Geo. III. c. 30.

[b] Stat. 4 Geo. II. c. 18.

[c] See the ſeveral ſtamp acts.

[d] Stat. 26 Geo. II. c. 33.

(18) And by 24 Geo. III. ſeſſ. 2. c. 53. ſuch offences are made capital felonies.

(19) And by 24 Geo. III. ſeſſ. 2. c. 37. to forge the ſuperſcription of any letter in order to avoid the payment of the poſtage, is a felony puniſhed by tranſportation for ſeven years.

THERE are alſo certain other general laws, with regard to forgery; of which the firſt is 2 Geo. II. c. 25. whereby the firſt offence in forging or procuring to be forged, acting or aſſiſting therein, or uttering or publiſhing as true any forged deed, will, bond, writing obligatory, bill of exchange, promiſſory
[250] note, indorſement or aſſignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any perſon, (or corporation [e],) is made felony without benefit of clergy. And by ſtatute 7 Geo. II. c. 22. and 18 Geo. III. c. 18. it is equally penal to forge or cauſe to be forged or utter as true a counterfeit acceptance of a bill of exchange, or the number or principal ſum of any accountable receipt for any note, bill, or any other ſecurity for money; or any warrant or order for the payment of money, or delivery of goods (20). So that, I believe, through the number of theſe general and ſpecial proviſions, there is now hardly a caſe poſſible to be conceived, wherein forgery, that tends to defraud, whether in the name of a real or fictitious perſon [f], is not made a capital crime (21).

[e] Stat. 31 Geo. II. c. 22. § 78. [f] Foſt. 116, &c.

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(20) The judges have decided that an order to a ſhopkeeper in a forged name to deliver goods to the bearer is not a forgery within the ſtatute; but a warrant or order within the ſtatute 7 Geo. II. c. 22. muſt import that the perſon giving ſuch warrant or order has, or at leaſt claims, an intereſt in the money or goods which are the ſubject-matter of that warrant or order, that he has or at leaſt aſſumes a diſpoſing power over ſuch money or goods, and takes upon himſelf to transfer the property, or cuſtody of them to the perſon in whoſe favour ſuch warrant or order is made. *Mitchell's caſe*, *Foſt.* 120. And it muſt be directed to the perſon who has the cuſtody of the goods. *Clench's caſe*, *Leach*, 437. But a draft upon a banker in the name of a perſon who kept no caſh at the banker's ſhop, is a forgery within the ſtatute, as it aſſumes that there was caſh kept at the houſe which the drawer had authority to diſpoſe of. *Locket's caſe*, *Ibid.* 89.

(21) It has frequently been determined, that drawing, indorſing or accepting a bill of exchange in a fictitious name is a forgery.

Bolland's

THESE are the principal infringements of the rights of property: which were the laſt ſpecies of offences againſt individuals or private ſubjects, which the method of our diſtribution has led us to conſider. We have before examined the nature of all offences againſt the public, or commonwealth; againſt the king or ſupreme magiſtrate, the father and protector of that community; againſt the univerſal law of all civilized nations; together with ſome of the more atrocious offences, of publicly pernicious conſequences, againſt God and his holy religion. And theſe ſeveral heads comprehend the whole circle of crimes and miſdemeſnors, with the puniſhment annexed to each, that are cognizable by the laws of England.

Bolland's caſe, &c. *Leach*, 78. 159. 192. 1 *Hen. Black.* 588. *Foſt.* 116. It is alſo forgery to fabricate a will by counterfeiting the name of a pretended teſtator, who is ſtill living. *Cogan's caſe*, *Ibid.* 355.

If a perſon puts his own name to an inſtrument, repreſenting himſelf to be a different perſon of that name with an intent to defraud, he is guilty of forgery. 4 *T. R.* 28.

But where a bill of exchange is indorſed by a perſon in his own name, and another repreſents himſelf to be that perſon, he is not guilty of forgery, but it is a miſdemeanour. *Hevey's caſe*, *Leach*, 268.

A bill or note may be produced in evidence againſt a priſoner proſecuted for the forgery of it; and he may be convicted upon the uſual evidence of the forgery, though it has never been ſtamped purſuant to the ſtamp acts. *Hawkeſwood's and Reculiſt's caſes*, *Leach*, 292 & 811. For the forgery in ſuch a caſe is committed with an intent to defraud; and the legiſlature meant only to prevent their being given in evidence, when they were proceeded upon to recover the value of the money thereby ſecured. But lord Kenyon has declared that he did not approve of the deciſion of the majority of the judges in theſe caſes. *Peake*, 168. It has been declared that the forgery of a bill of exchange in a form which rendered it void under the 17 Geo. III. c. 30. (ſee 2 vol. 467.) was not a capital offence, becauſe if real, it was not valid or negotiable. *Moffatt's caſe*, *Leach*, 483.

Every indictment for forgery muſt ſet out the forged inſtrument in words and figures. *Maſon's caſe*, 1 *Eaſt*, 180.

But it is ſufficient to ſet forth the receipt at the bottom of an account, without ſetting out the account itſelf. *Teſtick's caſe*, *Ibid.* 181. The word *purport*, in an indictment for forgery, ſignifies the ſubſtance of an inſtrument, as it appears on the face of it; tenor, means an exact copy of it. *Ibid.* 180. *Leach*, 753.

The moſt effectual ſtatute for the prevention of the forgery of bank notes, is the 41 Geo. III. c. 41. which enacts that if any one ſhall knowingly have in his poſſeſſion, or in his houſe, any forged bank notes, knowing the ſame to be forged, without lawful excuſe, the proof whereof ſhall lie upon the perſon accuſed, he ſhall be guilty of felony, and ſhall be tranſported for fourteen years.

And if any perſon ſhall make any plate or inſtrument for forging bank notes, or any part of a bank note, or ſhall knowingly have them in his poſſeſſion without authority in writing from the governor and company of the bank of England, he ſhall be guilty of felony, and ſhall be tranſported for ſeven years.

CHAPTER THE EIGHTEENTH.

OF THE MEANS OF PREVENTING OFFENCES.

WE are now arrived at the fifth general branch, or head, under which I propoſed to conſider the ſubject of this book of our commentaries; *viz.* the means of *preventing* the commiſſion of crimes and miſdemeſnors. And really it is an honour, and almoſt a ſingular one, to our Engliſh laws, that they furniſh a title of this ſort: ſince *preventive* juſtice is upon every principle of reaſon, of humanity, and of ſound policy, preferable in all reſpects to *puniſhing* juſtice[a]; the execution of which, though neceſſary, and in it's conſequences a ſpecies of mercy to the commonwealth, is always attended with many harſh and diſagreeable circumſtances.

THIS preventive juſtice conſiſts in obliging thoſe perſons, whom there is a probable ground to ſuſpect of future miſbehaviour, to ſtipulate with and to give full aſſurance to the public, that ſuch offence as is apprehended ſhall not happen; by finding pledges or ſecurities for keeping the peace, or for their good behaviour. This requiſition of ſureties has been ſeveral times mentioned before, as part of the penalty inflicted upon ſuch as have been guilty of certain groſs miſdemeſnors: but there alſo it muſt be underſtood rather as a caution againſt the repetition of the offence, than any immediate pain or puniſhment. And indeed, if we conſider all human puniſhments in a large and extended view, we ſhall find [252
them all rather calculated to prevent future crimes, than to

[a] Beccar. ch. 41.

expiate

expiate the paſt: ſince, as was obſerved in a former chapter [b], all puniſhments inflicted by temporal laws may be claſſed under three heads; ſuch as tend to the amendment of the offender himſelf, or to deprive him of any power to do future miſchief, or to deter others by his example: all of which conduce to one and the ſame end, of preventing future crimes, whether that be effected by amendment, diſability, or example. But the caution, which we ſpeak of at preſent, is ſuch as is intended merely for prevention, without any crime actually committed by the party, but ariſing only from a probable ſuſpicion, that ſome crime is intended or likely to happen; and conſequently it is not meant as any degree of puniſhment, unleſs perhaps for a man's imprudence in giving juſt ground of apprehenſion.

By the Saxon conſtitution theſe ſureties were always at hand, by means of king Alfred's wiſe inſtitution of decennaries or frankpledges; wherein, as has more than once been obſerved [c], the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. But this great and general ſecurity being now fallen into diſuſe and neglected, there hath ſucceeded to it the method of making ſuſpected perſons find particular and ſpecial ſecurities for their future conduct: of which we find mention in the laws of king Edward the confeſſor [d]; "*tradat fidejuſſores* "*de pace et legalitate tuenda.*" Let us therefore conſider, firſt, what this ſecurity is; next, who may take or demand it; and laſtly, how it may be diſcharged.

1. This ſecurity conſiſts in being bound, with one or more ſureties, in a recognizance or obligation to the king, entered on record, and taken in ſome court or by ſome judicial officer; whereby the parties acknowlege themſelves to be indebted to the crown in the ſum required, (for inſtance 100*l.*) with condition to be void and of none effect, if the
[253] party ſhall appear in court on ſuch a day, and in the mean time ſhall keep the peace; either generally, towards the king,

[b] See pag. 11. [c] See Vol. I. pag. 114. [d] *cap.* 18.

and

and all his liege people; or particularly alſo, with regard to the perſon who craves the ſecurity. Or, if it be for the good behaviour, then on condition that he ſhall demean and behave himſelf well, (or be of good behaviour,) either generally or ſpecially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a juſtice of the peace, muſt be certified to the next ſeſſions, in purſuance of the ſtatute 3 Hen. VII. c. 1. and if the condition of ſuch recognizance be broken, by any breach of the peace in the one caſe, or any miſbehaviour in the other, the recognizance becomes forfeited or abſolute; and being *eſtreated* or extracted (taken out from among the other records) and ſent up to the exchequer, the party and his ſureties having now become the king's abſolute debtors, are ſued for the ſeveral ſums in which they are reſpectively bound.

2. ANY juſtices of the peace, by virtue of their commiſſion, or thoſe who are *ex officio* conſervators of the peace, as was mentioned in a former volume [e], may demand ſuch ſecurity according to their own diſcretion; or it may be granted at the requeſt of any ſubject, upon due cauſe ſhewn, provided ſuch demandant be under the king's protection; for which reaſon it has been formerly doubted, whether jews, pagans, or perſons convicted of a *praemunire*, were entitled thereto [f]. Or, if the juſtice is averſe to act, it may be granted by a mandatory writ, called a *ſupplicavit*, iſſuing out of the court of king's bench or chancery; which will compel the juſtice to act, as a miniſterial and not as a judicial officer: and he muſt make a return to ſuch writ, ſpecifying his compliance, under his hand and ſeal [g]. But this writ is ſeldom uſed: for, when application is made to the ſuperior courts, they uſually take the recognizances there, under the directions of the ſtatute 21 Jac. I. c. 8. And indeed a peer or peereſs cannot be bound over in any other place, than the courts of king's bench or chancery: though a juſtice of the [254] peace has a power to require ſureties of any other perſon,

[e] See Vol. I. pag. 350.
[f] 1 Hawk. P. C. 126.
[g] F N. B. 80. 2 P. Wms. 202.

being

being *compos mentis* and under the degree of nobility, whether he be a fellow juſtice or other magiſtrate, or whether he be merely a private man [h]. Wives may demand it againſt their huſbands: or huſbands, if neceſſary, againſt their wives [i]. But feme coverts, and infants under age, ought to find ſecurity by their friends only, and not to be bound themſelves; for they are incapable of engaging themſelves to anſwer any debt; which, as we obſerved, is the nature of theſe recognizances or acknowlegements.

3. A RECOGNIZANCE may be diſcharged, either by the demiſe of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which ſuch recognizance is certified by the juſtices, (as the quarter ſeſſions, aſſiſes, or king's bench,) if they ſee ſufficient cauſe: or in caſe he at whoſe requeſt it was granted, if granted upon a private account, will releaſe it, or does not make his appearance to pray that it may be continued [j].

THUS far what has been ſaid is applicable to both ſpecies of recognizances, for the *peace*, and for the *good behaviour*: *de pace, et legalitate, tuenda*, as expreſſed in the laws of king Edward. But as theſe two ſpecies of ſecurities are in ſome reſpects different, eſpecially as to the cauſe of granting, or the means of forfeiting them, I ſhall now conſider them ſeparately: and firſt, ſhall ſhew for what cauſe ſuch a recognizance, with ſureties for the *peace*, is grantable; and then, how it may be forfeited.

1. ANY juſtice of the peace may, *ex officio*, bind all thoſe to keep the peace, who in his preſence make any affray; or threaten to kill or beat another: or contend together with hot and angry words; or go about with unuſual weapons
[255] or attendance, to the terror of the people; and all ſuch as he knows to be common barretors; and ſuch as are brought

[h] 1 Hawk. P. C. 127.
[i] 2 Stra. 1207.
[j] 1 Hawk. P. C. 129.

before

before him by the conſtable for a breach of the peace in his preſence: and all ſuch perſons, as, having been before bound to the peace, have broken it and forfeited their recognizances [k]. Alſo, wherever any private man hath juſt cauſe to fear, that another will burn his houſe, or do him a corporal injury, by killing, impriſoning, or beating him: or that he will procure others ſo to do: he may demand ſurety of the peace againſt ſuch perſon: and every juſtice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will ſhew that he has juſt cauſe to be ſo, by reaſon of the other's menaces, attempts, or having lain in wait for him; and will alſo farther ſwear, that he does not require ſuch ſurety out of malice or for mere vexation [l]. This is called *ſwearing the peace* againſt another: and, if the party does not find ſuch ſureties, as the juſtice in his diſcretion ſhall require, he may immediately be committed till he does [m].

2. SUCH recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an aſſault, or menace, to the perſon of him who demanded it, if it be a ſpecial recognizance: or, if the recognizance be general, by any unlawful action whatſoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many ſpecies of offences which were mentioned as crimes againſt the public peace in the eleventh chapter of this book: or, by any private violence committed againſt any of his majeſty's ſubjects. But a bare treſpaſs upon the lands or goods of another, which is a ground for a civil action, unleſs accompanied with a wilful breach of the peace, is no forfeiture of the recognizance [n]. Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, ſo as to forfeit one's recognizance, (being looked upon to be merely the effect of unmeaning heat and paſſion,) [256] unleſs they amount to a challenge to fight [o].

[k] 1 Hawk. P. C. 126.
[l] *Ibid.* 127.
[m] *Ibid.* 128.
[n] *Ibid.* 131.
[o] *Ibid.* 130.

THE

THE other ſpecies of recognizance, with ſureties, is for the *good abearance*, or *good behaviour*. This includes ſecurity for the peace, and ſomewhat more: we will therefore examine it in the ſame manner as the other.

1. FIRST, then, the juſtices are empowered by the ſtatute 34 Edw. III. c. 1. to bind over to the good behaviour towards the king and his people, all them *that be not of good fame*, wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminiſhed, nor merchants and others, paſſing by the highways of the realm, be diſturbed nor put in the peril which may happen by ſuch offenders. Under the general words of this expreſſion, *that be not of good fame*, it is holden that a man may be bound to his good behaviour for cauſes of ſcandal, *contra bonos mores*, as well as *contra pacem*; as, for haunting bawdy-houſes with women of bad fame; or for keeping ſuch women in his own houſe; or for words tending to ſcandalize the government, or in abuſe of the officers of juſtice, eſpecially in the execution of their office. Thus alſo a juſtice may bind over all night-walkers; eaves-droppers; ſuch as keep ſuſpicious company, or are reported to be pilferers or robbers; ſuch as ſleep in the day, and wake in the night; common drunkards; whoremaſters; the putative fathers of baſtards; cheats; idle vagabonds; and other perſons, whoſe miſbehaviour may reaſonably bring them within the general words of the ſtatute, as perſons not of good fame: an expreſſion, it muſt be owned, of ſo great a latitude, as leaves much to be determined by the diſcretion of the magiſtrate himſelf. But, if he commits a man for want of ſureties, he muſt expreſs the cauſe thereof with convenient certainty; and take care that ſuch cauſe be a good one[p].

[257] 2. A RECOGNIZANCE for the good behaviour may be forfeited by all the ſame means, as one for the ſecurity of the peace may be; and alſo by ſome others. As, by going armed with unuſual attendance, to the terror of the people;

[p] 1 Hawk. P. C. 132.

by ſpeaking words tending to ſedition; or by committing any of thoſe acts of miſbehaviour, which the recognizance was intended to prevent. But not by barely giving freſh cauſe of ſuſpicion of that which perhaps may never actually happen[q]: for, though it is juſt to compel ſuſpected perſons to give ſecurity to the public againſt miſbehaviour that is apprehended; yet it would be hard, upon ſuch ſuſpicion, without the proof of any actual crime, to puniſh them by a forfeiture of their recognizance.

[q] 1 Hawk. P. C. 133.

CHAPTER THE NINETEENTH.

OF COURTS OF A CRIMINAL JURISDICTION.

THE ſixth, and laſt, object of our inquiries will be the method of *inflicting* thoſe *puniſhments*, which the law has annexed to particular offences; and which I have conſtantly ſubjoined to the deſcription of the crime itſelf. In the diſcuſſion of which I ſhall purſue much the ſame general method that I followed in the preceding book, with regard to the redreſs of civil injuries: by, firſt, pointing out the ſeveral *courts* of criminal juriſdiction, wherein offenders may be proſecuted to puniſhment; and by, ſecondly, deducing down, in their natural order, and explaining, the ſeveral *proceedings* therein.

FIRST, then, in reckoning up the ſeveral *courts* of criminal juriſdiction, I ſhall, as in the former caſe, begin with an account of ſuch, as are of a *public* and *general* juriſdiction throughout the whole realm; and, afterwards, proceed to ſuch, as are only of a *private* and *ſpecial* juriſdiction, and confined to ſome particular parts of the kingdom.

I. IN our inquiries into the criminal courts of *public* and *general* juriſdiction, I muſt in one reſpect purſue a different order from that in which I conſidered the civil tribunals. For there, as the ſeveral courts had a gradual ſubordination to each other, the ſuperior correcting and reforming the errors of the inferior, I thought it beſt to begin with the loweſt, and ſo aſcend gradually to the courts of appeal, or thoſe of

the moſt extenſive powers. But as it is contrary to the genius and ſpirit of the law of England, to ſuffer any man to be tried twice for the ſame offence in a criminal way, eſpecially if acquitted upon the firſt trial; therefore theſe criminal courts may be ſaid to be all independent of each other: at leaſt ſo far, as that the ſentence of the loweſt of them can never be controlled or reverſed by the higheſt juriſdiction in the kingdom, unleſs for error in matter of law, apparent upon the face of the record; though ſometimes cauſes may be removed from one to the other before trial. And therefore as, in theſe courts of criminal cognizance, there is not the ſame chain and dependence as in the others, I ſhall rank them according to their dignity, and begin with the higheſt of all; *viz.*

1. THE high court of *parliament*; which is the ſupreme court in the kingdom, not only for the making, but alſo for the execution, of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attaint particular perſons of treaſon or felony, or to inflict pains and penalties, beyond or contrary to the common law, to ſerve a ſpecial purpoſe, I ſpeak not of them; being to all intents and purpoſes new laws, made *pro re nata*, and by no means an execution of ſuch as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a proſecution of the already known and eſtabliſhed law, and has been frequently put in practice; being a preſentment to the moſt high and ſupreme court of criminal juriſdiction by the moſt ſolemn grand inqueſt of the whole kingdom [a]. A commoner cannot however be impeached before the lords for any capital offence, but only for high miſdemeſnors [b]: a peer may be impeached for any

[a] 1 Hal. P. C. *150.

[b] When, in 4 Edw. III. the king demanded the earls, barons, and peers, to give judgment againſt Simon de Bereford, who had been a notorious accomplice in the treaſons of Roger earl of Mortimer, they came before the king in parliament, and ſaid all with one voice, that the ſaid Simon was not their *peer*; and therefore they were not bound to judge

crime (1). And they uſually (in caſe of an impeachment of a peer for treaſon) addreſs the crown to appoint a lord high ſteward, for the greater dignity and regularity of their proceedings; which high ſteward was formerly elected by the peers themſelves, though he was generally commiſſioned by

judge him as a peer of the land. And when afterwards, in the ſame parliament, they were prevailed upon, in reſpect of the notoriety and heinouſneſs of his crimes, to receive the charge and to give judgment againſt him, the following proteſt and proviſo was entered in the parliament-roll. "And it is aſſented "and accorded by our lord the king, "and all the great men, in full parliament, that albeit the peers, as judges "of the parliament, have taken upon "them in the preſence of our lord the "king to make and render the ſaid judgment; yet the peers who now are, or "ſhall be in time to come, be not bound "or charged to render judgment upon "others than peers; nor that the peers "of the land have power to do this, but "thereof ought ever to be diſcharged "and acquitted; and that the aforeſaid "judgment now rendered be not drawn "to example or conſequence in time to "come, whereby the ſaid peers may be "charged hereafter to judge others than "their peers, contrary to the laws of the "land, if the like caſe happen, which "God forbid." (*Rot. Parl. 4 Edw. III. n.* 2 & 6. 2 Brad. Hiſt. 190. Selden judic. in parl. ch. 1.)

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(1) But according to the laſt reſolution of the houſe of lords, a commoner may be impeached for a capital offence.—On the 26th of March 1680, Edward Fitzharris a commoner was impeached by the commons of high treaſon. Upon which the attorney general acquainted the peers that he had an order from the king to proſecute Fitzharris by indictment, and a queſtion thereupon was put, whether he ſhould be proceeded againſt according to the courſe of the common law or by way of impeachment, and it was reſolved againſt proceeding in the impeachment. 13 *Lords' Journ.* p. 755. Fitzharris was afterwards proſecuted by indictment, and he pleaded in abatement that there was an impeachment pending againſt him for the ſame offence; but this plea was overruled, and he was convicted and executed. But on the 26th of June 1689, Sir Adam Blair and four other commoners were impeached for high treaſon, in having publiſhed a proclamation of James the ſecond. On the 2d of July a long report of precedents was produced, and a queſtion was put to the judges whether the record 4 Edw. III. N° 6. was a ſtatute. They anſwered, as it appeared to them by the copy, they believed it to be a ſtatute; but if they ſaw the roll itſelf, they could be more poſitive. It was then moved to aſk the judges, but the motion was

the king [c]; but it hath of late years been ſtrenuouſly maintained [d], that the appointment of an high ſteward in ſuch caſes is not indiſpenſably neceſſary, but that the houſe may proceed without one. The articles of impeachment are a kind of bills of indictment, found by the houſe of commons, and afterwards tried by the lords; who are in caſes of miſdemeſnors conſidered not only as their own peers, but as the peers of the whole nation. This is a cuſtom derived to us from the conſtitution of the antient Germans; who in their great councils ſometimes tried capital accuſations relating to the public: "*licet apud conſilium accuſare quoque, et diſcrimen capitis intendere* [e]." And it has a peculiar propriety in the Engliſh conſtitution; which has much improved upon the antient model imported hither from the continent. For, though in general the union of the legiſlative and judicial powers ought to be moſt carefully avoided [f], yet it may happen that a ſubject, intruſted with the adminiſtration of public affairs, may infringe the rights of the people, and be guilty of ſuch crimes, as the ordinary magiſtrate either dares not or cannot puniſh. Of theſe the repreſentatives of [261] the people, or houſe of commons, cannot properly *judge*; becauſe their conſtituents are the parties injured: and can therefore only *impeach*. But before what court ſhall this impeachment be tried? Not before the ordinary tribunals, which would naturally be ſwayed by the authority of ſo powerful an accuſer. Reaſon therefore will ſuggeſt, that this branch of the legiſlature, which repreſents the people,

[c] 1 Hal. P. C. 350.
[d] Lords' Journ. 12 May 1679. Com. Journ. 15 May 1679. Foſt. 142, &c.
[e] Tacit. *de mor. Germ.* 12.
[f] See Vol. I. pag. 269.

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was negatived, whether by this record the lords were barred from trying a commoner for a capital crime upon an impeachment of the commons. And they immediately reſolved to proceed in this impeachment, notwithſtanding the parties were commoners and charged with high treaſon. 14 *Lords' Journ.* p. 260.

But the impeachment was not proſecuted with effect, on account of an intervening diſſolution of the parliament.

must bring it's charge before the other branch, which consists of the nobility, who have neither the same interests, nor the same passions as popular assemblies [g]. This is a vast superiority, which the constitution of this island enjoys, over those of the Grecian or Roman republics; where the people were at the same time both judges and accusers. It is proper that the nobility should judge, to insure justice to the accused; as it is proper that the people should accuse, to insure justice to the commonwealth. And therefore, among other extraordinary circumstances attending the authority of this court, there is one of a very singular nature, which was insisted on by the house of commons in the case of the earl of Danby in the reign of Charles II.[h]; and it is now enacted by statute 12 & 13 W. III. c. 2. that no pardon under the great seal shall be pleadable to an impeachment by the commons of Great Britain in parliament [i] (2).

2. THE court of the *lord high steward* of Great Britain [k] is a court instituted for the trial of peers, indicted for treason or felony, or for misprision of either [l]. The office of this great magistrate is very antient; and was formerly hereditary, or at least held for life, or *dum bene se gesserit:* but now it is usually, and hath been for many centuries past [m], granted

[g] Montesq. Sp. L. xi. 6.
[h] Com. Journ. 5 May 1679.
[i] See ch. 31.
[k] 4 Inst. 58. 2 Hawk. P. C. 5. 421.
[l] 1 Bulstr. 198. 2 Jon. 54.
[m] Pryn. on 4 Inst. 46.

(2) In the impeachment of Warren Hastings, Esq. it was confidently advanced, that the lords are not bound to observe the same rules of evidence in an impeachment, as are admitted in criminal trials in the inferior courts. The high reputation of those, who strenuously maintained this doctrine, induced the editor to endeavour to prove, that it was not only contrary to all precedent and authority, but repugnant to the first and great principles both of the English law and constitution, in a pamphlet, entitled "A Dissertation, shewing "that the house of lords in cases of judicature are bound by pre-"cisely the same rules of evidence, as are observed by all other "courts." See more upon impeachments in page 399.

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pro hac vice only; and it hath been the conſtant practice (and therefore ſeems now to have become neceſſary) to grant it to a lord of parliament, elſe he is incapable to try ſuch [262] delinquent peer [n]. When ſuch an indictment is therefore found by a grand jury of freeholders in the king's bench, or at the aſſiſes before the juſtices of *oyer* and *terminer*, it is to be removed by a writ of *certiorari* into the court of the lord high ſteward, which only has power to determine it. A peer may plead a pardon before the court of king's bench, and the judges have power to allow it; in order to prevent the trouble of appointing an high ſteward, merely for the purpoſe of receiving ſuch plea. But he may not plead, in that inferior court, any other plea; as *guilty*, or *not guilty*, of the indictment: but only in this court: becauſe, in conſequence of ſuch plea, it is poſſible that judgment of death might be awarded againſt him. The king therefore, in caſe a peer be indicted for treaſon, felony, or miſpriſion, creates a lord high ſteward *pro hac vice* by commiſſion under the great ſeal; which recites the indictment ſo found, and gives his grace power to receive and try it *ſecundum legem et conſuetudinem Angliae*. Then, when the indictment is regularly removed, by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high ſteward directs a precept to a ſerjeant at arms, to ſummon the lords to attend and try the indicted peer. This precept was formerly iſſued to ſummon only eighteen or twenty, ſelected from the body of the peers: then the number came to be indefinite; and the cuſtom was, for the lord high ſteward to ſummon as many as he thought proper, (but of late years not leſs than twenty-three [o],) and that thoſe lords only ſhould ſit upon the trial (3): which threw

[n] *Quand un* ſeigneur de parlement *ſerra arrein de treaſon ou felony, le roy par ſes lettres patents ſera un grand et ſage* ſeigneur *d'eſtre le grand ſen ſchal d'Angleterre: qui—doit faire un precept—— pur faire venir xx* ſeigneurs, *ou xviii, &c.* (Yearb. 13 *Hen. VIII.* 11.) See Staundf. P. C. 152. 3 Inſt. 28. 4 Inſt. 59. 2 Hawk. P. C. 5. Barr. 234.

[o] Kelynge. 56.

(3) The deciſion is by a majority, but a majority cannot convict, unleſs it conſiſts of twelve or more. See 3 vol. p. 376. n. 20.

a monſtrous weight of power into the hands of the crown, and this it's great officer, of ſelecting only ſuch peers as the then predominant party ſhould moſt approve of. And accordingly, when the earl of Clarendon fell into diſgrace with Charles II.
[263] there was a deſign formed to prorogue the parliament, in order to try him by a ſelect number of peers: it being doubted whether the whole houſe could be induced to fall in with the views of the court [p]. But now, by ſtatute 7 W. III. c. 3, upon all trials of peers for treaſon or miſpriſion, all the peers who have a right to ſit and vote in parliament ſhall be ſummoned, at leaſt twenty days before ſuch trial, to appear and vote therein; and every lord appearing ſhall vote in the trial of ſuch peer, firſt taking the oaths of allegiance and ſupremacy, and ſubſcribing the declaration againſt popery (4).

DURING the ſeſſion of parliament the trial of an indicted peer is not properly in the court of the lord high ſteward, but before the court laſt mentioned, of our lord the *king in parliament* [q]. It is true, a lord high ſteward is always appointed in that caſe, to regulate and add weight to the proceedings: but he is rather in the nature of a ſpeaker *pro*

[p] Carte's life of Ormonde. Vol. II. [q] Foſt. 141.

(4) As a peer cannot have the benefit of a challenge like a commoner, (1 *Harg. St. Tr.* 198. 388.) it is ſomewhat ſurpriſing that this manifeſt improvement of the law and conſtitution was not extended to trials of peers for all felonies, in the court of the lord high ſteward. Lord Mountmorres informs us that there are but two inſtances of the trials of peers in Ireland, *viz.* of viſcount Netterville in 1743, and of lord Santry about the ſame time. The firſt was tried in the high court of parliament, the latter in the court of the high ſteward. They were both indicted for murder. Lord Netterville was acquitted; Lord Santry was convicted, but pardoned as to his life. Upon Lord Santry's trial all the peers were ſummoned, though the regulation of 7 W. III. was not introduced into Ireland till the year 1773. *Lord Mountm.* 2 vol. 197. Murder is high treaſon by the law of Ireland,

tempore, or chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge of matters of law, as the lords triors are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial[r]. Therefore, upon the conviction and attainder of a peer for murder in full parliament, it hath been holden by the judges[s], that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament, during it's sitting, though no high steward be existing; or, in the recess of parliament, by the court of king's bench, the record being removed into that court.

[264]

IT has been a point of some controversy, whether the bishops have now a right to sit in the court of the lord high steward, to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of king William, "all peers, who have a right "to sit and vote in parliament:" but the expression had been much clearer, if it had been, "all *lords*," and not, "all "*peers*;" for though bishops, on account of the baronies annexed to their bishopricks, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility: and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for indeed they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that, in the eleventh chapter of the constitutions of Clarendon, made in parliament 11 Hen. II. they are expressly ex-

[r] State Trials, Vol. IV. 214. 232, 3. [s] Fost. 139.

cuſed, rather than excluded, from ſitting and voting in trials, when they come to concern life or limb: "*epiſcopi, ſicut* "*caeteri barones, debent intereſſe judiciis cum baronibus, quouſque* "*perveniatur ad diminutionem membrorum, vel ad mortem:*" and Becket's quarrel with the king hereupon was not on account of the exception, (which was agreeable to the canon law,) but of the general rule, that compelled the biſhops to attend at all. And the determination of the houſe of lords in the earl of Danby's caſe [t] which hath ever ſince ſteen adhered to, is conſonant to theſe conſtitutions; "that the "lords ſpiritual have a right to ſtay and ſit in court in ca- "pital caſes, till the court proceeds to the vote of guilty, or "not guilty." It muſt be noted, that this reſolution extends only to trials *in full parliament:* for to the court of the lord high ſteward (in which no vote can be given, but merely that of guilty, or not guilty) no biſhop, as ſuch, ever was or could be ſummoned; and though the ſtatute of king William
[265] regulates the proceedings in that court, as well as in the court of parliament, yet it never intended to new-model or alter it's conſtitution; and conſequently does not give the lords ſpiritual any right in caſes of blood which they had not before [u]. And what makes their excluſion more reaſonable, is, that they have no right to be tried themſelves in the court of the lord high ſteward [w], and therefore ſurely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a ſeat in the houſe; as appears from the trials of popiſh lords, of lords under age, and (ſince the union) of the Scots nobility, though not in the number of the ſixteen; and from the trials of females, ſuch as the queen conſort or dowager, and of all peereſſes by birth; and peereſſes by marriage alſo, unleſs they have, when dowagers, diſparaged themſelves by taking a commoner to their ſecond huſband (5).

[t] Lords' Journ. 15 May 1679.
[u] Foſt. 248.
[w] Bro. *Abr. t. Trial.* 142.

(5) But peereſſes by marriage cannot be ſaid to be ennobled by blood; for after the death of their huſbands they have even a leſs eſtate

3. THE court of *king's bench* [x], concerning the nature of which we partly inquired in the preceding book [y], was (we may remember) divided into a *crown* ſide, and a *plea* ſide. And on the crown ſide, or crown office, it takes cognizance of all criminal cauſes, from high treaſon down to the moſt trivial miſdemeſnor or breach of the peace. Into this court alſo indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar, or at *niſi prius*, by a jury of the county out of which the indictment is brought (6). The judges of this court are the ſupreme coroners of the kingdom. And the court itſelf is the principal court of criminal juriſdiction (though the two former are of greater dignity) known to the laws of England. For which reaſon by the coming of the court of king's bench into any county, (as it was removed to Oxford on account of the ſickneſs in 1665,) all former commiſſions of *oyer* and *terminer*, and general gaol delivery, are at once abſorbed and determined *ipſo facto*: in the ſame manner as by the old Gothic and Saxon conſtitu-

[x] 4 Inſt. 70. 2 Hal. P. C. 2. 2 Hawk. P. C. 6.

[y] See Vol. III. pag. 41.

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eſtate in their nobility than biſhops, it being only *durante viduitate*. See the editor's conjecture how the notion was originally introduced that biſhops were not entitled to a trial by the peers in parliament, Vol. I. p. 401. n. 8. Since that note was written, the editor has been happy in finding what he ſuggeſted only as a conjecture drawn from general principles, confirmed by the more extenſive learning of the late Vinerian profeſſor Mr. Wooddeſon, who not only has adopted the ſame opinion, but has adduced in confirmation of it ſeveral inſtances of biſhops, who being arraigned before a jury, demanded the privileges of the church, and diſclaimed the authority of all ſecular juriſdictions. 2 *Woodd.* 585.

(6) All informations filed in the court of king's bench, and all indictments removed there by *certiorari*, if not tried at the bar of the court, which rarely happens, muſt be tried at the aſſiſes by writ of *niſi prius*.

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tions, "*jure vetuſto obtenuit, quieviſſe omnia inferiora judicia, "dicente jus rege*" [z] (7)."

INTO this court of king's bench hath reverted all that was good and ſalutary of the juriſdiction of the court of *ſtar-chamber, camera ſtellata* [a]: which was a court of very antient

[z] Stiernhook, *l.* 1. *c.* 2.

[a] This is ſaid (Lamb. *Arch.* 154) to have been ſo called, either from the Saxon word ꝑteoꝛnan to *ſteer* or govern;—or from it's puniſhing the *crimen ſtellionatus*, or coſenage;—or becauſe the room wherein it ſate, the old council chamber of the palace of Weſtminſter, (Lamb. 148.) which is now converted into the lottery office, and forms the eaſtern ſide of new palace-yard, was full of windows;—or (to which ſir Edward Coke, 4 Inſt. 66. accedes) becauſe *haply* the roof thereof was at the firſt garniſhed with gilded *ſtars*. As all theſe are merely conjectures, (for no ſtars are now in the roof, nor any are ſaid to have remained there ſo late as the reign of queen Elizabeth,) it may be allowable to propoſe another conjectural etymology, as plauſible perhaps as any of them. It is well known that, before the baniſhment of the Jews under Edward I. their contracts and obligations were denominated in our antient records *ſtarra* or *ſtarrs*, from a corruption of the Hebrew word, *ſhetâr*, a covenant, (Tovey's *Angl. judaic.* 32 Selden. tit. of hon. ii. 34. *Uxor. Ebraic.* i. 14.) Theſe ſtarrs, by an ordinance of Richard the firſt, preſerved by Hoveden, were commanded to be enrolled and depoſited in cheſts under three keys in certain places; one, and the moſt conſiderable, of which was in the king's exchequer at Weſtminſter; and no ſtarr was allowed to be valid, unleſs it were found in ſome of the ſaid repoſitories. *(Memorand. in Scacc. P. 6 Edw.* I. prefixed to Maynard's year-book of Edw. II. fol. 8. Madox. hiſt. exch. c. vii. § 4, 5, 6.) The room at the exchequer, where the cheſts containing theſe ſtarrs were kept, was probably called the *ſtarr-chamber;* and, when the Jews were expelled the kingdom, was applied to the uſe of the king's council, ſitting in their judicial capacity. To confirm this, the firſt time the ſtar-chamber is mentioned in any record, it is ſaid to have been ſituated near the receipt of the exchequer at Weſtminſter; (the king's council, his chancellor, treaſurer, juſtices, and other ſages, were aſſembled *en le chambre des ſteilles pres la reſceipt al Weſtminſter.*— *Clauſ.*

(7) But by the 25 Geo. III. c. 18. it is enacted that the ſeſſion of oyer and terminer, and gaol delivery of the gaol of Newgate, for the county of Middleſex, ſhall not be diſcontinued on account of the commencement of the term, and the ſitting of the court of king's bench at Weſtminſter, but may be continued till the buſineſs is concluded. And the 32 Geo. III. c. 48. was paſſed to continue in like manner the ſeſſions of the peace, and of oyer and terminer, held before the juſtices of the peace for the county of Middleſex.

original,

original[b], but new modelled by ſtatutes 3 Hen. VII. c. 1. and 21 Hen. VIII. c. 20. conſiſting of divers lords ſpiritual and temporal, being privy counſellors, together with two judges of the courts of common law, without the intervention of any jury. Their juriſdiction extended legally over riots, perjury, miſbehaviour of ſheriffs, and other notorious miſdemeſnors, contrary to the laws of the land. Yet this was [267] afterwards (as lord Clarendon informs us[c]) ſtretched "to "the aſſerting of all proclamations, and orders of ſtate: to "the vindicating of illegal commiſſions, and grants of mo- "nopolies; holding for honourable that which pleaſed, and "for juſt that which profited, and becoming both a court "of law to determine civil rights, and a court of revenue to "enrich the treaſury; the council table by proclamations "enjoining to the people that which was not enjoined by "the laws, and prohibiting that which was not prohibited; "and the ſtar-chamber, which conſiſted of the ſame perſons "in different rooms, cenſuring the breach and diſobedience "to thoſe proclamations by very great fines, impriſonments, "and corporal ſeverities: ſo that any diſreſpect to any acts "of ſtate, or to the perſons of ſtateſmen, was in no time "more penal, and the foundations of right never more in

Clauſ. 41 *Edw. III. m.* 13.) For in proceſs of time, when the meaning of the Jewiſh *ſtarrs* was forgotten, the word *ſtar-chamber* was naturally rendered in law french, *le chaumbre des eſtoilles*, and in law latin *camera ſtellata*; which continued to be the ſtyle in latin till the diſſolution of that court (8).

[b] Lamb. *Arch.* 156.

[c] Hiſt. of reb. book 1 & 3.

(8) In one of the ſtatutes of the univerſity of Cambridge, the antiquity of which is not known, the word *ſtarrum* is twice uſed for a ſchedule or inventory. The ſtatute is intitled *De computatione procuratorum*, and it directs that *in fine computi fiat* ſtarrum *per modum dividendæ, in quo ponentur omnia remanentia in communi ciſtâ tam pignora quam pecunia, ac etiam arreragia et debita, ita quod omnibus conſtare poterit evidenter, in quo ſtatu tunc univerſitas fuerit quoad bona, &c.* *Stat. Acad. Cant.* p. 32. Such inventories would be made at the king's exchequer, and the room where they were depoſited would probably be called the Star-chamber.

"danger

"danger to be deſtroyed." For which reaſons it was finally aboliſhed by ſtatute 16 Car. I. c. 10. to the general joy of the whole nation [d].

4. THE court of *chivalry* [e], of which we alſo formerly ſpoke [f] as a military court, or court of honour, when held before the earl marſhal only, is alſo a criminal court, when held before the lord high conſtable of England jointly with the earl marſhal. And then it has juriſdiction over pleas of life and member, ariſing in matters of arms and deeds of war, as well out of the realm as within it. But the cri-
[268] minal, as well as civil part of it's authority, is fallen into entire diſuſe; there having been no permanent high conſtable of England (but only *pro hac vice* at coronations and the like) ſince the attainder and execution of Stafford duke of Buckingham in the thirteenth year of Henry VIII; the authority and charge, both in war and peace, being deemed too ample for a ſubject: ſo ample, that when the chief juſtice Fineux was aſked by king Henry the eighth, how far they extended, he declined anſwering: and ſaid, the deciſion of that queſtion belonged to the law of arms, and not to the law of England [g].

[d] The juſt odium into which this tribunal had fallen before it's diſſolution, has been the occaſion that few memorials have reached us of it's nature, juriſdiction, and practice; except ſuch as on account of their enormous oppreſſion, are recorded in the hiſtories of the times. There are however to be met with ſome reports of its proceedings in Dyer, Croke, Coke, and other reporters of that age, and ſome in manuſcript; of which the author has two; one from 40 Eliz. to 13 Jac. I. the other for the firſt three years of king Charles; and there is in the Britiſh Muſeum (Harl. MSS. Vol. I. n°. 1226) a very full, methodical, and accurate account of the conſtitution and courſe of this court, compiled by William Hudſon of Gray's Inn, an eminent practitioner therein (9); and a ſhort account of the ſame, with copies of all it's proceſs, may alſo be found in 18 Rym. *Fœd.* 192, &c.

[e] 4 Inſt. 123. 2 Hawk. P. C. 9.

[f] See Vol. III. pag. 68.

[g] Duck. *de authorit. jur. civ.*

(9) Hudſon's Treatiſe of the Court of Star-Chamber is now publiſhed at the beginning of the 2d Vol. of Collectanea Juridica.

5. THE

5. THE high court of *admiralty* [h], held before the lord high admiral of England, or his deputy, ſtiled the judge of the admiralty, is not only a court of civil, but alſo of criminal juriſdiction. This court hath cognizance of all crimes and offences committed either upon the ſea, or on the coaſts, out of the body or extent of any Engliſh county; and by ſtatute 15 Ric. II. c. 3. of death and mayhem happening in great ſhips being and hovering in the main ſtream of great rivers, below the bridges of the ſame rivers, which are then a ſort of ports or havens; ſuch as are the ports of London and Glouceſter, though they lie at a great diſtance from the ſea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exerciſe of a criminal juriſdiction there was contrary to the genius of the law of England; inaſmuch as a man might be there deprived of his life by the opinion of a ſingle judge, without the judgment of his peers. And beſides, as innocent perſons might thus fall a ſacrifice to the caprice of a ſingle man, ſo very groſs offenders might, and did frequently eſcape puniſhment: for the rule of the civil law is, how reaſonably I ſhall not at preſent inquire, that no judgment of death can be given againſt offenders, without proof by two witneſſes, or a confeſſion of the fact by themſelves. This was always a great offence to the Engliſh nation: and therefore in the eighth year of Henry VI. it was endeavoured to apply a remedy in parliament: which then miſcarried for want of [269] the royal aſſent. However, by the ſtatute 28 Hen. VIII. c. 15. it was enacted, that theſe offences ſhould be tried by commiſſioners of *oyer* and *terminer*, under the king's great ſeal; namely, the admiral, or his deputy, and three or four more; (among whom two common law judges are uſually appointed;) the indictment being firſt found by a grand jury of twelve men, and afterwards tried by a petty jury: and that the courſe of proceedings ſhould be according to the law of the land. This is now the only method of trying marine felonies in the court of admiralty: the judge of the admiralty ſtill preſiding therein, as the lord

[h] 4 Inſt. 134. 147.

mayor is the preſident of the ſeſſion of *oyer* and *terminer* in London (10).

THESE five courts may be held in any part of the kingdom, and their juriſdiction extends over crimes that ariſe throughout the whole of it, from one end to the other. What follow are alſo of a general nature, and univerſally diffuſed over the nation, but yet are of a local juriſdiction, and confined to particular diſtricts. Of which ſpecies are

6, 7. THE courts of *oyer* and *terminer*, and general *gaol delivery*[i]: which are held before the king's commiſſioners, among whom are uſually two judges of the courts at Weſtminſter, twice in every year in every county of the kingdom; except the four northern ones, where they are held only once, and London and Middleſex, wherein they are held eight times. Theſe were ſlightly mentioned in the preceding book[k]. We then obſerved, that, at what is uſually called the aſſiſes, the judges ſit by virtue of five ſeveral authorities: two of which, the commiſſion of *aſſiſe* and it's

[i] 4 Inſt. 162. 168. 2 Hal. P. C. 22. 32. 2 Hawk. P. C. 14. 23.

[k] See Vol. III. pag. 60.

(10) The juriſdiction of the commiſſioners appointed under the 28 Hen. VIII. c. 15. was confined by that ſtatute to treaſons, felonies, robberies, murders, and confederacies; and therefore the 39 Geo. III. c. 15. declares that it is expedient that other offences committed on the ſeas ſhould be tried in the like manner; and it enacts that every offence committed upon the high ſeas ſhall be ſubject to the ſame puniſhment, as if it had been committed upon the ſhore, and ſhall be tried in the ſame manner as the crimes enumerated in the 28 Hen. VIII. c. 15. are directed to be tried.

And as perſons tried for murder under that ſtatute could not be found guilty of manſlaughter, and where the circumſtances made the crime manſlaughter, were acquitted entirely, the 39 Geo. III. c. 15. expreſsly enacts that where perſons tried for murder or manſlaughter committed on the high ſeas are found guilty of manſlaughter only, they ſhall be ſubject to the ſame puniſhment as if they had committed ſuch manſlaughter upon the land.

attendant

attendant jurisdiction of *nisi prius*, being principally of a civil nature, were then explained at large; to which I shall only add that these justices have, by virtue of several statutes, a criminal jurisdiction also, in certain special cases [l]. The third, which is the commission of the *peace*, was also [270] treated of in a former volume [m], when we inquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county, wherein the assizes are held, are bound by law to attend them, or else are liable to a fine; in order to return recognizances, &c. and to assist the judges in such matters as lie within their knowlege and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the fourth authority is the commission of *oyer* and *terminer* [n], to hear and determine all treasons, felonies, and misdemesnors. This is directed to the judges and several others, or any two of them; but the judges or serjeants at law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear, and determine:" so that by virtue of this commission they can only proceed upon an indictment found at the same assizes; for they must first inquire, by means of the grand jury or inquest, before they are empowered to hear and determine by the help of the petit jury. Therefore they have besides, fifthly, a commission of general *gaol delivery* [o]; which empowers them to try and deliver every prisoner, who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted, or for whatever crime committed. It was antiently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo* [p]: but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished, or delivered, twice in every year:

[l] 2 Hal. P. C. 39. 2 Hawk. P. C. 28.

[m] See Vol. I. pag. 351.

[n] See appendix, § 1.

[o] *Ibid.*

[p] 2 Inst. 43.

a con-

a conſtitution of ſingular uſe and excellence. Sometimes alſo, upon urgent occaſions, the king iſſues a ſpecial or extraordinary commiſſion of *oyer* and *terminer*, and *gaol delivery*, confined to thoſe offences which ſtand in need of immediate inquiry and puniſhment: upon which the courſe of proceeding is much the ſame, as upon general and ordi-
[271] nary commiſſions. Formerly it was held, in purſuance of the ſtatutes 8 Ric. II. c. 2. and 33 Hen. VIII. c. 4. that no judge or other lawyer could act in the commiſſion of *oyer* and *terminer*, or in that of gaol delivery, within his own county where he was born or inhabited; in like manner as they are prohibited from being judges of aſſize and determining civil cauſes. But that local partiality, which the jealouſy of our anceſtors was careful to prevent, being judged leſs likely to operate in the trial of crimes and miſdemeſnors, than in matters of property and diſputes between party and party, it was thought proper by the ſtatute 12 Geo. II. c. 27. to allow any man to be a juſtice of *oyer* and *terminer* and general gaol delivery within any county of England.

8. THE court of general *quarter ſeſſions* of the peace [q] is a court that muſt be held in every county once in every quarter of a year; which by ſtatute 2 Hen. V. c. 4. is appointed to be in the firſt week after michaelmas day; the firſt week after the epiphany; the firſt week after the cloſe of eaſter; and in the week after the tranſlation of St. Thomas the martyr, or the ſeventh of July. It is held before two or more juſtices of the peace, one of which muſt be of the *quorum*. The juriſdiction of this court, by ſtatute 34 Edw. III. c. 1. extends to the trying and determining all felonies and treſpaſſes whatſoever: though they ſeldom, if ever, try any greater offence than ſmall felonies within the benefit of clergy (11); their commiſſion providing, that, if any caſe

[q] 4 Inſt. 170. 2 Hal. P. C. 42. 2 Hawk. P. C. 32.

(11) It is the practice to try all ſimple larcinies at the quarter ſeſſions, whatever may be the value of the article ſtolen; but it is ſtated in the indictment to be of ſome value not exceeding a ſhilling,

of difficulty arifes, they ſhall not proceed to judgment, but in the preſence of one of the juſtices of the courts of king's bench or common pleas, or one of the judges of aſſiſe. And therefore murders, and other capital felonies, are uſually remitted for a more ſolemn trial to the aſſiſes. They cannot alſo try any new-created offence, without expreſs power given them by the ſtatute which creates it [r]. But there are many offences, and particular matters, which by particular ſtatutes belong properly to this juriſdiction, and ought to be proſecuted in this court: as, the ſmaller miſdemeſnors, againſt the public or commonwealth, not amounting to felony; and eſpecially offences relating to the game, highways, alehouſes, baſtard children, the ſettlement and proviſion for the poor, vagrants, ſervants' wages, apprentices, and popiſh recuſants [s]. Some of theſe are proceeded upon by indictment; and others in a ſummary way by motion and order thereupon; which order may for the moſt part, unleſs guarded againſt by particular ſtatutes, be removed into the court of king's bench, by writ of *certiorari facias*, and be there either quaſhed or confirmed. The records or [272]

[r] 4 Mod. 379. Salk. 406. Lord Raym. 1144.

[s] See Lambard *eirenarcha* and Burn's Juſtice.

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ling, in order to reduce the crime to petty larceny. The juſtices ſeldom try any felonies, upon conviction of which the priſoner muſt pray the benefit of clergy, or now the benefit of the ſtatute. For before the 5 Ann. c. 6. ſentence of death in all ſuch caſes muſt have been paſſed upon thoſe who could not read. And it may ſtill be doubted whether it muſt not be paſſed upon a convict, who obſtinately refuſes to pray the benefit of that ſtatute. See p. 370. *poſt.*

The ſeſſions have juriſdiction over all miſdemeanours, except forgery and perjury, by the common law; as theſe two offences were not conſidered to be breaches of the peace, which it was the chief object of the inſtitution of the commiſſion of the peace to preſerve; but as theſe ſeem to tend as much to a diſturbance of the peace as a ſecret fraud, the reaſon for theſe exceptions is not very ſatisfactory. But the 5 Eliz. c. 9. gives the quarter ſeſſions expreſsly juriſdiction to try the perjuries ſpecified in that ſtatute. 2 *Hawk.* 40. *Burn, tit.* Perjury. 1 *Eaſt*, 173. 2 *Eaſt*, 18.

rolls of the seſſions are committed to the cuſtody of a ſpecial officer denominated the *cuſtos rotulorum*, who is always a juſtice of the *quorum*; and among them of the *quorum* (ſaith Lambard [s]) a man for the moſt part eſpecially picked out, either for wiſdom, countenance, or credit. The nomination of the *cuſtos rotulorum* (who is the principal *civil* officer in the county, as the lord lieutenant is the chief in *military* command) is by the king's ſign manual: and to him the nomination of the clerk of the peace belongs; which office he is expreſsly forbidden to ſell for money [t] (12).

In moſt corporation towns there are quarter-ſeſſions kept before juſtices of their own, within their reſpective limits: which have exactly the ſame authority as the general quarter-ſeſſions of the county, except in a very few inſtances; one of the moſt conſiderable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation juſtices, muſt be to the ſeſſions of the county, by ſtatute 8 & 9 W. III. c. 30. In both corporations and counties at large, there is ſometimes kept a ſpecial or petty ſeſſion, by a few juſtices for diſpatching ſmaller buſineſs in the neighbourhood between the times of the general ſeſſions; as, for licenſing alehouſes, paſſing the accounts of the pariſh officers, and the like.

[*273] 9. The *ſheriff's tourn* [u], or rotation, is a court of record, held twice every year within a month after eaſter and michaelmas, before the ſheriff, in different parts of the county; being indeed only the turn of the ſheriff to keep a court-leet in each reſpective hundred [w]: This therefore is the great court-leet of the county, as the county court is the court-baron; for out of this, for the eaſe of the ſheriff, was taken

[s] b. 4. c. 3.
[t] Stat. 37 Hen. VIII. c. 1. 1 W. & M. ſt. 1. c. 21.
[u] 4 Inſt. 259 2 Hal. P. C. 69, 2 Hawk. P. C. 55.
[w] Mirr. c. 1. § 13 & 16.

(12) But the juſtices at the quarter-ſeſſions, upon a complaint of his miſconduct, may ſuſpend or diſcharge him from his office. 1 W. c. 21. ſ. 6. See *Burn, tit.* Clerk, &c.

10. The

10. THE *court-leet*, or *view of frankpledge* [x], which is a court of record, held once in the year and not oftener [y], within a particular hundred, lordſhip, or manor, before the ſteward of the leet: being the king's court granted by charter to the lords of thoſe hundreds or manors. It's original intent was to view the frankpledges, that is, the freemen within the liberty; who, (we may remember [z],) according to the inſtitution of the great Alfred, were all mutually pledges for the good behaviour of each other. Beſides this, the preſervation of the peace, and the chaſtiſement of divers minute offences againſt the public good, are the objects both of the court-leet and the ſheriff's tourn: which have exactly the ſame juriſdiction, one being only a larger ſpecies of the other; extending over more territory, but not over more cauſes. All freeholders within the precinct are obliged to attend them, and all perſons commorant therein; which commorancy conſiſts in uſually lying there: a regulation, which owes it's original to the laws of king Canute [a]. But perſons under twelve and above ſixty years old, peers, clergymen, women, and the king's tenants in antient demeſne, are excuſed from attendance there: all others being bound to appear upon the jury, if required, and make their due preſentments. It was alſo antiently the cuſtom to ſummon all the king's ſubjects, as they reſpectively grew to years of diſcretion and ſtrength, to come to the court-leet, and there take the oath of allegiance to the king. The other general buſineſs of the leet and [274] tourn, was to preſent by jury all crimes whatſoever that happened within their juriſdiction; and not only to preſent, but alſo to puniſh, all trivial miſdemeſnors, as all trivial debts were recoverable in the court-baron, and county court: juſtice, in theſe minuter matters of both kinds, being brought home to the doors of every man by our antient conſtitution. Thus in the Gothic conſtitution, the, *haereda*, which anſwered to our court-leet, "*de omnibus quidem cognoſcit, non tamen de omnibus judicat* [b]." The objects of

[x] 4 Inſt. 261. 2 Hawk. P. C. 72.
[y] Mirror, c. 1 § 10.
[z] See Vol. III. pag. 113.
[a] *part.* 2. *c.* 19.
[b] Stiernh. *de jur. Goth. l.* 1. *c.* 2.

their jurisdiction are therefore unavoidably very numerous: being such as in some degree, either less or more, affect the public weal, or good governance of the district in which they arise; from common nusances and other material offences against the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet have been for a long time in a declining way: a circumstance, owing in part to the discharge granted by the statute of Marlbridge, 52 Hen. III. c. 10. to all prelates, peers, and clergymen from their attendance upon these courts; which occasioned them to grow into disrepute. And hence it is that their business hath for the most part gradually devolved upon the quarter sessions: which it is particularly directed to do in some cases by statute 1 Ed. IV. c. 2.

11. THE court of the *coroners* [c] is also a court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled to do *super visum corporis*. Of the coroner and his office we treated at large in a former volume [d], among the public officers and ministers of the kingdom; and therefore shall not here repeat our inquiries: only mentioning his court, by way of regularity, among the criminal courts of the nation.

[275] 12. THE court of the *clerk of the market* [e] is incident to every fair and market in the kingdom, to punish misdemesnors therein; as a court of *pie poudre* is, to determine all disputes relating to private or civil property. The object of this jurisdiction [f] is principally the recognizance of weights and measures, to try whether they be according to the true standard thereof, or no: which standard was antiently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly:

[c] 4 Inst. 271. 2 Hal. P. C. 53. 2 Hawk. P. C. 42.
[d] See Vol. I. pag. 349.
[e] 4 Inst. 273.
[f] See stat. 17 Car. II. c. 19. 22 Car. II. c. 8. 23 Car. II. c. 12.
[g] Bacon of English Gov. b. 1. c. 8.

and hence this officer, though now usually a layman, is called the *clerk* of the market[g]. If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burnt. This is the most inferior court of criminal jurisdiction in the kingdom; though the objects of it's coërcion were esteemed among the Romans of such importance to the public, that they were committed to the care of some of their most dignified magistrates, the curule aediles.

II. THERE are a few other criminal courts of greater dignity than many of these, but of a more confined and partial jurisdiction; extending only to some particular places which the royal favour, confirmed by act of parliament, has distinguished by the privilege of having peculiar courts of their own, for the punishment of crimes and misdemesnors arising within the bounds of their cognizance. These, not being universally dispersed, or of general use, as the former, but confined to one spot, as well as to a determinate species of causes, may be denominated private or special courts of criminal jurisdiction.

I SPEAK not here of ecclesiastical courts; which punish spiritual sins, rather than temporal crimes, by penance, contrition, and excommunication, *pro salute animae*; or, which is looked upon as equivalent to all the rest, by a sum of money to the officers of the court by way of commutation of [276] penance. Of these we discoursed sufficiently in the preceding book[h]. I am now speaking of such courts as proceed according to the course of the common law; which is a stranger to such unaccountable barterings of public justice.

1. AND, first, the court of the *lord steward, treasurer*, or *comptroller* of the king's *household*[i], was instituted by statute 3 Hen. VII. c. 14. to inquire of felony by any of the king's sworn servants, in the cheque roll of the household, under

[g] Bacon of English Gov. b. 1. c. 8. [h] See Vol III. p. 61. [i] 4 Inst. 133.

the degree of a lord, in confederating, compaſſing, conſpiring, and imagining the death or deſtruction of the king, or any lord or other of his majeſty's privy council, or the lord ſteward, treaſurer, or comptroller of the king's houſe. The inquiry, and trial thereupon, muſt be by a jury according to the courſe of the common law, conſiſting of twelve ſad men, (that is, ſober and diſcreet perſons,) of the king's houſhold.

2. THE court of the *lord ſteward* of the king's *houſhold*, or (in his abſence) of the treaſurer, comptroller, and ſteward of the *marſhalſea*[k], was erected by ſtatute 33 Hen. VIII. c. 12. with a juriſdiction to inquire of, hear, and determine, all treaſons, miſpriſions of treaſon, murders, manſlaughters, bloodſhed, and other malicious ſtrikings; whereby blood ſhall be ſhed in, or within the limits, (that is, within two hundred feet from the gate,) of any of the palaces and houſes of the king, or any other houſe where the royal perſon ſhall abide. The proceedings are alſo by jury, both a grand and a petit one, as at common law, taken out of the officers and ſworn ſervants of the king's houſhold. The form and ſolemnity of the proceſs, particularly with regard to the execution of the ſentence for cutting off the hand, which is part of the puniſhment for ſhedding blood in the king's court, are very minutely ſet forth in the ſaid ſtatute 33 Hen. VIII. and the ſeveral officers of the ſervants of the houſhold in and about ſuch ex-
[277] ecution are deſcribed; from the ſerjeant of the wood yard, who furniſhes the chopping block, to the ſerjeant farrier, who brings hot irons to ſear the ſtump.

3. As in the preceding book[l] we mentioned the courts of the two univerſities, or their chancellor's courts, for the redreſs of civil injuries: it will not be improper now to add a ſhort word concerning the juriſdiction of their criminal courts, which is equally large and extenſive. The chancellor's court of Oxford (with which univerſity the author hath been chiefly converſant, though probably that of Cambridge hath alſo a ſimilar juriſdiction) hath authority to de-

[k] 4 Inſt. 133. 2 Hal. P. C. 7.

[l] See Vol. III. pag. 83.

termine all cauſes of property, wherein a privileged perſon is one of the parties, except only cauſes of freehold; and alſo all criminal offences or miſdemeſnors under the degree of treaſon, felony, or mayhem. The prohibition of meddling with freehold ſtill continues: but the trial of treaſon, felony, and mayhem, by a particular charter is committed to the univerſity juriſdiction in another court, namely, the court of the *lord high ſteward* of the univerſity.

FOR by the charter of 7 Jun. 2 Hen. IV. (confirmed, among the reſt, by the ſtatute 13 Eliz. c. 29.) cognizance is granted to the univerſity of Oxford of all indictments of treaſons, inſurrections, felony, and mayhem, which ſhall be found in any of the king's courts againſt a ſcholar or privileged perſon; and they are to be tried before the high ſteward of the univerſity, or his deputy, who is to be nominated by the chancellor of the univerſity for the time being. But, when his office is called forth into action, ſuch high ſteward muſt be approved by the lord high chancellor of England; and a ſpecial commiſſion under the great ſeal is given to him, and others, to try the indictment then depending, according to the law of the land and the privileges of the ſaid univerſity. When therefore an indictment is found at the aſſiſes, or elſewhere, againſt any ſcholar of the univerſity, or other privileged perſon, the vice chancellor may [278] claim the cognizance of it; and (when claimed in due time and manner) it ought to be allowed him by the judges of aſſiſe: and then it comes to be tried in the high ſteward's court. But the indictment muſt firſt be found by a grand jury, and then the cognizance claimed: for I take it that the high ſteward cannot proceed originally *ad inquirendum;* but only, after inqueſt in the common law courts, *ad audiendum et determinandum.* Much in the ſame manner, as when a peer is to be tried in the court of the lord high ſteward of Great Britain, the indictment muſt firſt be found at the aſſizes, or in the court of king's bench, and then (in conſequence of a writ of *certiorari*) tranſmitted to be finally heard and determined before his grace the lord high ſteward and the peers.

WHEN the cognizance is ſo allowed, if the offence be *inter minora crimina*, or a miſdemeſnor only, it is tried in the chancellor's court by the ordinary judge. But if it be for treaſon, felony, or mayhem, it is then, and then only, to be determined before the high ſteward, under the king's ſpecial commiſſion to try the ſame. The proceſs of the trial is this. The high ſteward iſſues one precept to the ſheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedells of the univerſity, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio univerſitatis gaudentes:*" and by a jury formed *de medietate*, half of freeholders and half of matriculated perſons, is the indictment to be tried; and that in the Guildhall of the city of Oxford. And if execution be neceſſary to be awarded, in conſequence of finding the party guilty, the ſheriff of the county muſt execute the univerſity proceſs; to which he is annually bound by an oath.

[279] I HAVE been the more minute in deſcribing theſe proceedings, as there has happily been no occaſion to reduce them into practice for more than a century paſt; nor will it perhaps ever be thought adviſeable to revive them, though it is not a right that merely reſts *in ſcriptis* or theory, but has formerly often been carried into execution. There are many inſtances, one in the reign of queen Elizabeth, two in that of James the firſt, and two in that of Charles the firſt, where indictments for murder have been challenged by the vice-chancellor at the aſſiſes, and afterwards tried before the high ſteward by jury. The commiſſions under the great ſeal, the ſheriff's and bedell's panels, and all the other proceedings on the trial of the ſeveral indictments, are ſtill extant in the archives of that univerſity.

CHAPTER THE TWENTIETH.

OF SUMMARY CONVICTIONS.

WE are next, according to the plan I have laid down, to take into conſideration the proceedings in the courts of criminal juriſdiction, in order to the puniſhment of offences. Theſe are plain, eaſy, and regular; the law not admitting any fictions, as in civil cauſes, to take place where the life, the liberty, and the ſafety of the ſubject are more immediately brought into jeopardy. And theſe proceedings are diviſible into two kinds; *ſummary*, and *regular*: of the former of which I ſhall briefly ſpeak, before we enter upon the latter, which will require a more thorough and particular examination.

BY a *ſummary* proceeding I mean principally ſuch as is directed by ſeveral acts of parliament (for the common law is a ſtranger to it, unleſs in the caſe of contempts) for the conviction of offenders, and the inflicting of certain penalties created by thoſe acts of parliament. In theſe there is no intervention of a jury, but the party accuſed is acquitted or condemned by the ſuffrage of ſuch perſon only, as the ſtatute has appointed for his judge. An inſtitution deſigned profeſſedly for the greater eaſe of the ſubject, by doing him ſpeedy juſtice, and by not haraſſing the freeholders with frequent and troubleſome attendances to try every minute offence. But it has of late been ſo far extended, as if a [281] check be not timely given, to threaten the diſuſe of our admirable

mirable and truly Engliſh trial by jury, unleſs only in capital caſes. For,

I. OF this ſummary nature are all trials of offences and frauds contrary to the laws of the *exciſe*, and other branches of the *revenue*: which are to be inquired into and determined by the commiſſioners of the reſpective departments, or by juſtices of the peace in the country; officers, who are all of them appointed and removable at the diſcretion of the crown. And though ſuch convictions are abſolutely neceſſary for the due collection of the public money, and are a ſpecies of mercy to the delinquents, who would be ruined by the expenſe and delay of frequent proſecutions by action or indictment; and though ſuch has uſually been the *conduct* of the commiſſioners, as ſeldom (if ever) to afford juſt grounds to complain of oppreſſion; yet when we again [a] conſider the various and almoſt innumerable branches of this revenue; which may be in their turns the ſubjects of fraud, or at leaſt complaints of fraud, and of courſe the objects of this ſummary and arbitrary juriſdiction; we ſhall find that the power of theſe officers of the crown over the property of the people is increaſed to a very formidable height.

II. ANOTHER branch of ſummary proceedings is that before *juſtices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many diſorderly offences; ſuch as common ſwearing, drunkenneſs, vagrancy, idleneſs, and a vaſt variety of others, for which I muſt refer the ſtudent to the juſtice-books formerly cited [b], and which uſed to be formerly puniſhed by the verdict of a jury in the court-leet. This change in the adminiſtration of juſtice hath however had ſome miſchievous effects; as, 1. The almoſt entire diſuſe and contempt of the court-leet, and ſheriff's tourn, the king's antient courts of common law, formerly much revered and reſpected.
[282] 2. The burthenſome increaſe of the buſineſs of a juſtice of

[a] See Vol. I. pag. 319, &c. [b] Lambard and Burn.

the

the peace, which discourages so many gentlemen of rank and character from acting in the commission; from an apprehension that the duty of their office would take up too much of that time, which they are unwilling to spare from the necessary concerns of their families, the improvement of their understandings, and their engagements in other services of the public. Though if *all* gentlemen of fortune had it both in their power, and inclinations, to act in this capacity, the business of a justice of the peace would be more divided, and fall the less heavy upon individuals: which would remove what in the present scarcity of magistrates is really an objection so formidable, that the country is greatly obliged to any gentleman of figure, who will undertake to perform that duty, which in consequence of his rank in life he owes more peculiarly to his country. However, this backwardness to act as magistrates, arising greatly from this increase of summary jurisdiction, is productive of, 3. A third mischief: which is, that this trust, when slighted by gentlemen, falls of course into the hands of those who are not so; but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honour is highly formidable, will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment. And from these ill consequences we may collect the prudent foresight of our antient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any farther from our antient constitution, by ordaining new penalties to be inflicted upon summary convictions.

THE process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them, by making it necessary to *summon* the party accused before he is condemned. This is now held to be an indispensable requisite[c]: [283]

[c] Salk. 181. 2 Lord Raym. 1405.

though

though the juſtices long ſtruggled the point; forgetting that rule of natural reaſon expreſſed by Seneca,

" *Qui ſtatuit aliquid, parte inaudita altera,*
" *Aequom licet ſtatuerit, haud aequus fuit:*"

a rule, to which all municipal laws, that are founded on the principles of juſtice, have ſtrictly conformed; the Roman law requiring a citation at the leaſt; and our own common law never ſuffering any fact (either civil or criminal) to be tried, till it has previouſly compelled an appearance by the party concerned. After this ſummons, the magiſtrate, in ſummary proceedings, may go on to examine one or more witneſſes, as the ſtatute may require, upon oath; and then make his conviction of the offender, in writing: upon which he uſually iſſues his warrant, either to apprehend the offender, in caſe corporal puniſhment is to be inflicted on him; or elſe to levy the penalty incurred, by diſtreſs and ſale of his goods (1). This is, in general, the method of ſummary proceedings before a juſtice or juſtices of the peace: but for particulars we muſt have recourſe to the ſeveral ſtatutes, which create the offence, or inflict the puniſhment: and which uſually chalk out the method by which offenders are to be convicted. Otherwiſe they fall of courſe under the general

(1) By the 18 Geo. III. c. 19. juſtices of peace out of ſeſſions are empowered to award coſts againſt either the perſon complaining, or the perſon againſt whom the complaint is made; which if not paid may be levied by diſtreſs. And if no goods can be found of ſuch perſon, he may be committed to hard labour for any time not leſs than ten days, or more than a month, or until ſuch coſts be paid.

But where the penalty is 5 *l.* or more, the coſts may at the diſcretion of the juſtice be deducted from the penalty, provided the deduction ſhall not exceed one fifth of the penalty.

The juſtices at the ſeſſions may lay down rules for ſuch coſts, which rules, if they receive the approbation in writing of a judge of aſſiſe, ſhall be binding on all perſons whatever.

general rule, and can only be convicted by indictment or information at the common law.

III. To this head, of ſummary proceedings, may alſo be properly referred the method, immemorially uſed by the ſuperior courts of juſtice, of puniſhing contempts by *attachment*, and the ſubſequent proceedings thereon.

THE contempts, that are thus puniſhed, are either *direct*, which openly inſult or reſiſt the powers of the courts, or the perſons of the judges who preſide there: or elſe are *conſequential*, which (without ſuch groſs inſolence or direct oppoſition) plainly tend to create an univerſal diſregard of their authority. The principal inſtances, of either ſort, that have been uſually [d] puniſhable by attachment, are chiefly of the following kinds. 1. Thoſe committed by inferior judges and magiſtrates: by acting unjuſtly, oppreſſively, or irregularly, in adminiſtering thoſe portions of juſtice which are intruſted to their diſtribution; or by diſobeying the king's writs iſſuing out of the ſuperior courts, by proceeding in a cauſe after it is put a ſtop to or removed by writ of prohibition, *certiorari*, error, *ſuperſedeas*, and the like. For, as the king's ſuperior courts (and eſpecially the court of king's bench) have a general ſuperintendance over all inferior juriſdictions, any corrupt or iniquitous practices of ſubordinate judges are contempts of that ſuperintending authority, whoſe duty it is to keep them within the bounds of juſtice. 2. Thoſe committed by ſheriffs, bailiffs, gaolers, and other officers of the court: by abuſing the proceſs of the law, or deceiving the parties, by any acts of oppreſſion, extortion, colluſive behaviour, or culpable neglect of duty. 3. Thoſe committed by attorneys and ſolicitors, who are alſo officers of the reſpective courts: by groſs inſtances of fraud and corruption, injuſtice to their clients, or other diſhoneſt practice. For the mal-practice of the officers reflects ſome diſhonour on their employers: and, if frequent or unpuniſhed, creates among the people a diſguſt againſt the courts themſelves. [284]

[d] 2 Hawk. P. C. 142, &c.

4. Thoſe

4. Thoſe committed by jurymen, in collateral matters relating to the diſcharge of their office: ſuch as making default, when ſummoned; refuſing to be ſworn, or to give any verdict; eating or drinking without the leave of the court, and eſpecially at the coſt of either party; and other miſbehaviours or irregularities of a ſimilar kind: but not in the mere exerciſe of their judicial capacities, as by giving a falſe or erroneous verdict. 5. Thoſe committed by witneſſes: by making default when ſummoned, refuſing to be ſworn or examined, or prevaricating in their evidence when ſworn. 6. Thoſe committed by parties to any ſuit or proceeding before the court: as by diſobedience to any
[285] rule or order, made in the progreſs of a cauſe; by non-payment of coſts awarded by the court upon a motion; or by non-obſervance of awards duly made by arbitrators or umpires, after having entered into a rule for ſubmitting to ſuch determination[c]. Indeed the attachment for moſt of this ſpecies of contempts, and eſpecially for non-payment of coſts and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party; though carried on in the ſhape of a criminal proceſs for a contempt of the authority of the court (2). And therefore it hath been held that ſuch contempts, and the proceſs thereon, being properly the civil remedy of individuals for a private injury, are not releaſed or affected by a general act of pardon. And upon a ſimilar principle, obedience to any rule of court may alſo by ſtatute 10 Geo. III. c. 50. be enforced againſt any perſon having privilege of parliament by the proceſs of diſtreſs infinite. 7. Thoſe committed by any other perſons under the degree of a peer: and even by peers themſelves, when enormous

[c] See Vol. III. pag. 17.

(2) By 33 Geo. III. c. 5. perſons committed to priſon upon an attachment for non-payment of money, awarded to be paid upon a ſubmiſſion to an arbitration, which has been made a rule of court, or upon an attachment for not paying coſts, may have the benefit of that ſtatute as inſolvent debtors.

and

and accompanied with violence, such as forcible *rescous* and the like [f]; or when they import a disobedience to the king's great prerogative writs, of prohibition, *habeas corpus* [g], and the rest. Some of these contempts may arise in the face of the court; as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever: others in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court, or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by any thing in short that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

[286] THE process of attachment, for these and the like contempts, must necessarily be as antient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised, as early as the annals of our law extend. And, though a very learned author [h] seems inclinable to derive this process from the statute of Westm. 2. 13 Edw. I. c. 39. (which ordains, that in case the process of the king's courts be *resisted* by the power of any great man, the sheriff shall chastise the resisters by imprisonment, "*a qua non deliberen-*

[f] Styl. 227. 2 Hawk. P. C. 152. Cro. Jac. 419. Salk. 586.

[g] 4 Burr. 632. Lords' Journ. 7 Feb. 8 Jun. 1757.

[h] Gilb. Hist. C. P. ch. 3.

"*tur*

"*tur ſine ſpeciali praecepto domini regis:*" and if the ſheriff himſelf be reſiſted, he ſhall certify to the courts the names of the principal offenders, their aiders, conſenters, commanders, and favourers, and by a ſpecial writ judicial they ſhall be *attached* by their bodies to appear before the court, and if they be convicted thereof they ſhall be puniſhed at the king's pleaſure, without any interfering by any other perſon whatſoever,) yet he afterwards more juſtly concludes, that it is a part of the *law of the land*; and, as ſuch, is *confirmed* by the ſtatute of *magna carta*.

If the contempt be committed in the face of the court, the offender may be inſtantly apprehended and impriſoned, at the diſcretion of the judges [j], without any farther proof or examination. But in matters that ariſe at a diſtance, and of which the court cannot have ſo perfect a knowledge, unleſs by the confeſſion of the party or the teſtimony of others, if the judges upon *affidavit* ſee ſufficient ground to ſuſpect
[287] that a contempt has been committed, they either make a rule on the ſuſpected party to ſhew cauſe why an attachment ſhould not iſſue againſt him [i]; or, in very flagrant inſtances of contempt, the attachment iſſues in the firſt inſtance [k]; as it alſo does, if no ſufficient cauſe be ſhewn to diſcharge, and thereupon the court confirms and makes abſolute, the original rule. This proceſs of attachment is merely intended to bring the party into court: and, when there, he muſt either ſtand committed, or put in bail, in order to anſwer upon oath to ſuch *interrogatories* as ſhall be adminiſtered to him, for the better information of the court with reſpect to the circumſtances of the contempt. Theſe interrogatories are in the nature of a charge or accuſation, and muſt by the courſe of the court be exhibited within the firſt four days [l]: and if any of the interrogatories is improper, the defendant may refuſe to anſwer it, and move the court to have it ſtruck out [m]. If the party can clear himſelf

[j] Staundf. P. C. 73. *b.*
[k] Salk. 84. Stra. 185. 564.
[i] Styl. 277.
[l] 6 Mod. 73.
[m] Stra. 444.

upon

upon oath, he is discharged; but, if perjured, may be prosecuted for the perjury[n]. If he confesses the contempt, the court will proceed to correct him by fine, or imprisonment, or both, and sometimes by a corporal or infamous punishment[o]. If the contempt be of such a nature, that, when the fact is once acknowledged, the court can receive no farther information by interrogatories than it is already possessed of, (as in the case of a *rescous*[p],) the defendant may be admitted to make such simple acknowlegement, and receive his judgment, without answering to any interrogatories (3): but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

IT cannot have escaped the attention of the reader, that this method, of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance[q]; and seems indeed to have been derived to the courts of king's bench and common pleas through the medium of the courts of equity. For the whole process of the courts of equity, in the several stages of a cause, and finally to enforce their decrees, was, till the introduction of sequestrations, in the nature of a process of [288] contempt; acting only *in personam* and not *in rem*. And there, after the party in contempt has answered the interrogatories, such his answer may be contradicted and disproved by *affidavits* of the adverse party: whereas, in the courts of law, the admission of the party to purge himself by oath is

n 6 Mod. 73.
o Cro. Car. 146.
p The king v. Elkins. M. 8 Geo. III. B. R.
q See Vol. III. pag. 100, 101.

(3) Although the defendant acknowledges all the facts charged against him, yet it is the practice of the court to compel him to answer interrogatories, unless they are waived by the prosecutor. 5 *T. R.* 362.

more favourable to his liberty, though perhaps not less dangerous to his conscience; for, if he clears himself by his answers, the complaint is totally dismissed. And, with regard to this singular mode of trial, thus admitted in this one particular instance, I shall only for the present observe, that as the process by attachment in general appears to be extremely antient[r], and has in more modern times been recognized, approved, and confirmed by several express acts of parliament[s], so the method of examining the delinquent himself upon oath, with regard to the contempt alleged, is at least of as high antiquity[t], and by long and immemorial usage is now become the law of the land.

[r] Yearb. 20 Hen. VI. 37. 22 Edw. IV. 29.

[s] Stat. 43 Eliz. c. 6. § 3. 13 Car. II. st. 2. c. 2. § 4. 9 & 10 W. III. c. 15. 12 Ann. st. 2. c. 15. § 5.

[t] M. 5 Edw. IV. rot. 75. cited in Rast. Ent. 268. pl. 5.

CHAPTER THE TWENTY-FIRST.

OF ARRESTS.

WE are now to conſider the regular and ordinary method of proceeding in the courts of criminal juriſdiction; which may be diſtributed under twelve general heads, following each other in a progreſſive order: *viz.* 1. Arreſt; 2. Commitment and bail; 3. Proſecution; 4. Proceſs; 5. Arraignment, and it's incidents; 6. Plea, and iſſue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and it's conſequences; 10. Reverſal of judgment; 11. Reprieve, or pardon; 12. Execution: all which will be diſcuſſed in the ſubſequent part of this book.

FIRST then, of an *arreſt*: which is the apprehending or reſtraining of one's perſon, in order to be forthcoming to anſwer an alleged or ſuſpected crime. To this arreſt all perſons whatſoever are, without diſtinction, equally liable in all criminal caſes: but no man is to be arreſted, unleſs charged with ſuch a crime, as will at leaſt juſtify holding him to bail, when taken. And, in general, an arreſt may be made four ways: 1. By warrant: 2. By an officer without warrant: 3. By a private perſon alſo without a warrant: 4. By an hue and cry.

1. A WARRANT may be granted in extraordinary caſes by the privy council, or ſecretaries of ſtate [a]; but ordinarily by juſtices of the peace. This they may do in any caſes where [290]

[a] 1 Lord Raym. 65.

they have a jurisdiction over the offence; in order to compel the person accused to appear before them [b]: for it would be absurd to give them power to examine an offender, unless they had also a power to compel him to attend, and submit to such examination. And this extends undoubtedly to all treasons, felonies, and breaches of the peace; and also to all such offences as they have power to punish by statute. Sir Edward Coke indeed [c] hath laid it down that a justice of the peace cannot issue a warrant to apprehend a felon upon bare suspicion; no, not even till an indictment be actually found: and the contrary practice is by others [d] held to be grounded rather upon connivance, than the express rule of law; though now by long custom established. A doctrine, which would in most cases give a loose to felons to escape without punishment; and therefore sir Matthew Hale hath combated it with invincible authority, and strength of reason: maintaining, 1. That a justice of peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted* [e]; and, 2. That he may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant; because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted; as also to *prove* the cause and probability of suspecting the party, against whom the warrant is prayed [f]. This warrant ought to be under the hand and seal of the justice, should set forth the time and place of making, and the cause for which it is made, and should be directed to the
[291] constable, or other peace officer, (or, it may be, to any private person by name [g],) requiring him to bring the party either generally before *any* justice of the peace for the county, or only before the justice who granted it; the warrant in the

[b] 2 Hawk. P. C. 84.
[c] 4 Inst. 176.
[d] 2 Hawk. P. C. 84.
[e] 2 Hal. P. C. 108.
[f] *Ibid.* 110.
[g] Salk. 176.

latter case being called a *special* warrant [h]. A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for it's uncertainty [i]; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point, upon which it's authority rests, is a fact to be decided on a subsequent trial; namely whether the person apprehended thereupon be really guilty or not. It is therefore in fact *no* warrant at all; for it will not justify the officer who acts under it [k]: whereas a warrant, properly penned, (even though the magistrate who issues it should exceed his jurisdiction,) will, by statute 24 Geo. II. c. 44. at all events indemnify the officer, who executes the same ministerially. And, when a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief, or other, justice of the court of king's bench extends all over the kingdom: and is *teste'd*, or *dated*, *England*; not *Oxfordshire*, *Berks*, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county; but the practice [292]

[h] 2 Hawk. P. C. 85.

[i] 1 Hal. P. C. 580. 2 Hawk. P. C. 82.

[k] A practice had obtained in the secretaries office ever since the restoration, grounded on some clauses in the acts for regulating the press, of issuing *general* warrants to take up (without naming any person in particular) the authors, printers, and publishers of such obscene or seditious libels, as were particularly specified in the warrant. When those acts expired in 1694, the same practice was inadvertently continued, in every reign, and under every administration, except the four last years of queen Anne, down to the year 1763; when such a warrant being issued to apprehend the authors, printers, and publishers of a certain seditious libel, it's validity was disputed; and the warrant was adjudged by the whole court of king's bench to be void, in the case of Money *v.* Leach. *Trin.* 5 *Geo. III. B. R.* After which, the issuing of such general warrants was declared illegal by a vote of the house of Commons. (Com. Journ. 22 Apr. 1766.)

of backing warrants had long prevailed without law, and was at laſt authoriſed by ſtatutes 23 Geo. II. c. 26. and 24 Geo. II. c. 55. And now, by ſtatute 13 Geo. III. c. 31. any warrant for apprehending an Engliſh offender, who may have eſcaped into Scotland, and *vice verſa*, may be endorſed and executed by the local magiſtrates, and the offender conveyed back to that part of the united kingdoms, in which ſuch offence was committed.

2. ARRESTS by *officers, without warrant*, may be executed, 1. By a juſtice of the peace; who may himſelf apprehend, or cauſe to be apprehended, by word only, any perſon committing a felony or breach of the peace in his preſence [l]. 2. The ſheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The conſtable, of whoſe office we formerly ſpoke [m], hath great original and inherent authority with regard to arreſts. He may, without warrant, arreſt any one for a breach of the peace, committed in his view, and carry him before a juſtice of the peace. And, in caſe of felony *actually* committed, or a dangerous wounding whereby felony is like to enſue, he may upon probable ſuſpicion arreſt the felon; and for that purpoſe is authoriſed (as upon a juſtice's warrant) to break open doors, and even to kill the felon if he cannot otherwiſe be taken; and, if he or his aſſiſtants be killed in attempting ſuch arreſts, it is murder in all concerned [n]. 5. Watchmen, either thoſe appointed by the ſtatute of Wincheſter, 13 Edw. I. c. 4. to keep watch and ward in all towns from ſunſetting to ſunriſing, or ſuch as are mere aſſiſtants to the conſtable, may *virtute officii* arreſt all offenders, and particularly night-walkers, and commit them to cuſtody till the morning [o].

3. ANY private perſon (and *a fortiori* a peace officer) that is preſent when any felony is committed, is bound by the law
[293] to arreſt the felon; on pain of fine and impriſonment, if he

[l] 1 Hal. P. C. 86.
[m] See Vol. I. pag. 355.
[n] 2 Hal. P. C. 88—96.
[o] *Ibid*, 98.

escapes through the negligence of the standers-by [p]. And they may justify breaking open doors upon following such felon; and if *they kill him*, provided he cannot be otherwise taken, it is justifiable; though if *they are killed* in endeavouring to make such arrest, it is murder [q]. Upon probable suspicion also a private person may arrest the felon, or other person so suspected [r] (1). But he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more [s]. It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another; and also because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when a felony is committed.

4. THERE is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an *hue* and *cry* raised upon a felony committed. An hue (from *huer*, to shout) and cry, *hutesium et clamor*, is the old com-

[p] 2 Hawk. P. C. 74.
[q] 2 Hal. P. C. 77.
[r] Stat. 30 Geo. II. c. 24.
[s] 2 Hal. P. C. 82, 83.

(1) Where a felony has been actually committed, a private person acting with a good intention, and upon such information as amounts to a reasonable and probable ground of suspicion, is justified in apprehending without a warrant the suspected person in order to carry him before a magistrate. *Cald.* 291. But where a private person had delivered another into the custody of a constable, upon a suspicion, which appeared afterwards to be unfounded, it was held that the person so arrested might maintain an action of trespass for an assault and false imprisonment against such private person, although a felony had been actually committed. *6 T. R.* 315. But a peace-officer upon a reasonable charge of felony, may justify an arrest without a warrant, although no felony has been committed. Samuel *v.* Payne, *Doug.* 345. When doors may be broken open. See *Foster.* 136 & 319.

mon law proceſs of purſuing, with horn and with voice, all felons, and ſuch as have dangerouſly wounded another [t]. It is alſo mentioned by ſtatute Weſtm. 1. 3 Edw. I. c. 9. and 4 Edw. I. *de officio coronatoris*. But the principal ſtatute, relative to this matter, is that of Wincheſter, 13 Edw. I. c. 1. & 4. which directs, that from thenceforth every country ſhall be ſo well kept, that immediately upon robberies and felonies committed, freſh ſuit ſhall be made from town to town, and from county to county; and that hue and cry ſhall be raiſed upon the felons, and they that keep the town ſhall follow with hue and cry, with all the town and the
[294] towns near; and ſo hue and cry ſhall be made from town to town, until they be taken and delivered to the ſheriff. And, that ſuch hue and cry may more effectually be made, the hundred is bound by the ſame ſtatute, c. 3. to anſwer for all robberies therein committed, unleſs they take the felon; which is the foundation of an action againſt the hundred [u], in caſe of any loſs by robbery. By ſtatute 27 Eliz. c. 13. no hue and cry is ſufficient, unleſs made with both horſemen and footmen. And by ſtatute 8 Geo. II. c. 16. the conſtable or like officer, refuſing or neglecting to make hue and cry, forfeits 5 *l.*: and the whole vill or diſtrict is ſtill in ſtrictneſs liable to be amerced, according to the law of Alfred, if any felony be committed therein and the felon eſcapes. An inſtitution, which hath long prevailed in many of the eaſtern countries, and hath in part been introduced even into the Mogul empire, about the beginning of the laſt century; which is ſaid to have effectually delivered that vaſt territory from the plague of robbers, by making in ſome places the villages, in others the officers of juſtice, reſponſible for all the robberies committed within their reſpective diſtricts [w]. Hue and cry [x] may be raiſed either by precept of a juſtice of the peace, or by a peace officer, or by any private man that knows of a felony. The party raiſing it muſt acquaint the

[t] Bracton. *l.* 3. *tr.* 2. *c.* 1. § 1. Mirr. c. 2. § 6.

[u] See Vol. III. pag. 161.

[w] Mod. Un. Hiſt. vi. 383. vii. 156.

[x] 2 Hal. P. C. 100—104.

conſtable

conſtable of the vill with all the circumſtances which he knows of the felony, and the perſon of the felon; and thereupon the conſtable is to ſearch his own town, and raiſe all the neighbouring vills, and make purſuit with horſe and foot; and in the proſecution of ſuch hue and cry the conſtable and his attendants have the ſame powers, protection, and indemnification, as if acting under the warrant of a juſtice of the peace. But if a man wantonly or maliciouſly raiſes an hue and cry, without cauſe, he ſhall be ſeverely puniſhed as a diſturber of the public peace [y].

IN order to encourage farther the apprehending of certain felons, rewards and immunities are beſtowed on ſuch as bring them to juſtice, by divers acts of parliament. The ſtatute 4 & 5 W. & M. c. 8. enacts, that ſuch as apprehend a highwayman, and proſecute him to conviction, ſhall receive a reward of 40*l.* from the public; to be paid to them (or, if killed in the endeavour to take him, their executors) by the [295] ſheriff of the county; beſides the horſe, furniture, arms, money, and other goods taken upon the perſon of ſuch robber; with a reſervation of the right of any perſon from whom the ſame may have been ſtolen: to which the ſtatute 8 Geo. II. c. 16. ſuperadds 10*l.* to be paid by the hundred indemnified by ſuch taking. By ſtatutes 6 & 7 W. III. c. 17. and 15 Geo. II. c. 28. perſons apprehending and convicting any offender againſt thoſe ſtatutes, reſpecting the coinage, ſhall (in caſe the offence be treaſon or felony) receive a reward of forty pounds; or ten pounds, if it only amount to counterfeiting the copper coin. By ſtatute 10 & 11 W. III. c. 23. any perſon apprehending and proſecuting to conviction a felon guilty of burglary, houſebreaking, horſeſtealing, or private larciny to the value of 5*s.* from any ſhop, warehouſe, coach-houſe, or ſtable, ſhall be excuſed from all pariſh offices. And by ſtatute 5 Ann. c. 31. any perſon ſo apprehending and proſecuting a burglar, or felonious houſebreaker, (or, if killed in the attempt, his executors,) ſhall be

[y] 1 Hawk. P. C. 75.

entitled

entitled to a reward of 40*l*[z] (2). By ſtatute 6 Geo. I. c. 23. perſons diſcovering, apprehending, and proſecuting to conviction, any perſon taking reward for helping others to their ſtolen goods, ſhall be entitled to forty pounds. By ſtatute 14 Geo. II. c. 6. explained by 15 Geo. II. c. 34. any perſon apprehending and proſecuting to conviction ſuch as ſteal, or kill with intent to ſteal, any ſheep or other cattle ſpecified in the latter of the ſaid acts, ſhall for every ſuch conviction receive a reward of ten pounds. Laſtly, by ſtatute 16 Geo. II. c. 15. and 8 Geo. III. c. 15. perſons diſcovering, apprehending, and convicting felons and others being found at large during the term for which they are ordered to be tranſported, ſhall receive a reward of twenty pounds.

[z] The ſtatutes 4 & 5 W. & M. c. 8. 6 & 7 W. III. c. 17. and 5 Ann. c. 31. (together with 3 Geo. I. c. 15. § 4. which directs the method of re-imburſing the ſheriffs) are extended to the county palatine of Durham, by Stat. 14 Geo. III. c. 46.

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(2) If any perſon apprehends and proſecutes to conviction any of the felons deſcribed by the 10 & 11 W. III. c. 23. and the 5 Ann. c. 31. he ſhall be entitled to a certificate from the judge, which will exempt him from all pariſh offices in the pariſh in which the felony was committed. And before it is uſed for that purpoſe it may be aſſigned, that is, ſold once, and the aſſignee or buyer ſhall be privileged to the ſame exemption from it. This certificate of exemption, or Tyburn ticket, as it is ſometimes called, is the only reward given to the proſecutors of horſeſtealers, and of felons, who ſteal to the value of 5*s*. privately from ſhops, warehouſes, coach-houſes, and ſtables.

CHAPTER THE TWENTY-SECOND.

OF COMMITMENT AND BAIL.

WHEN a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace: and how he is there to be treated, I shall next shew, under the second head, of *commitment* and *bail*.

THE justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged: and to this end by statute 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of such prisoner, and the information of those who bring him: which, Mr. Lambard observes [a], was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum:* and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men. If upon this inquiry it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer the charge against him. This commitment therefore being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offences of a capi-

[a] *Eirenarch.* b. 2. c. 7. See pag. 357.

tal

tal nature, no bail can be a ſecurity equivalent to the actual cuſtody of the perſon. For what is there that a man may not be induced to forfeit, to ſave his own life? and what ſatisfaction or indemnity is it to the public, to ſeize the effects of them who have bailed a murderer, if the murderer himſelf be ſuffered to eſcape with impunity? Upon a principle ſimilar to which, the Athenian magiſtrates, when they took a ſolemn oath, never to keep a citizen in bonds that could give three ſureties of the ſame quality with himſelf, did it with an exception to ſuch as had embezzled the public money, or been guilty of treaſonable practices [b]. What the nature of bail is, hath been ſhewn in the preceding book [c], *viz.* a delivery or bailment, of a perſon to his ſureties, upon their giving (together with himſelf) ſufficient ſecurity for his appearance: he being ſuppoſed to continue in their friendly cuſtody, inſtead of going to gaol. In civil caſes we have ſeen that every defendant is bailable; but in criminal matters it is otherwiſe. Let us therefore inquire, in what caſes the party accuſed ought, or ought not, to be admitted to bail.

AND, firſt, to refuſe or delay to bail any perſon bailable, is an offence againſt the liberty of the ſubject, in any magiſtrate by the common law [d], as well as by the ſtatute Weſtm. 1. 3 Edw. I. c. 15. and the *habeas corpus* act, 31 Car. II. c. 2. And, leſt the intention of the law ſhould be fruſtrated by the juſtices requiring bail to a greater amount than the nature of the caſe demands, it is expreſsly declared by ſtatute 1 W. & M. ſt. 2. c. 1. that exceſſive bail ought not to be required; though what bail ſhall be called exceſſive, muſt be left to the courts, on conſidering the circumſtances of the caſe, to determine. And, on the other hand, if the magiſtrate takes inſufficient bail, he is liable to be fined, if the criminal doth not appear [e]. Bail may be taken either in court, or in ſome particular caſes by the ſheriff, coroner, or other magiſtrate: but moſt uſually by the juſtices of the peace. Regularly, in all offences either againſt the common

[b] Pott. Antiq. b. 1. c. 18.
[c] See Vol. III. pag. 290.
[d] 2 Hawk. P. C. 90.
[e] *Ibid.* 89.

law

law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament [f]. In order therefore more precisely to ascertain what offences *are* bailable.

LET us next see, who may *not* be admitted to bail, or, what offences are *not* bailable. And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners *convicted* of particular offences: for then such imprisonment without bail is part of their sentence and punishment. But, where the imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given, *viz.* the body of the accused; in order to insure that justice shall be done upon him, if guilty. Such persons therefore, as the author of the mirror observes [g], have no other sureties but the four walls of the prison. By the antient common law, before [h] and since [i] the conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. 1. 3 Edw. I. c. 15. takes away the power of bailing in treason, and in divers instances of felony. The statutes 23 Hen. VI. c. 9. and 1 & 2 Ph. & Mar. c. 13. give farther regulations in this matter; and upon the whole we may collect [k], that no justice of the peace can bail, 1. Upon an accusation of treason: nor, 2. Of murder: nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if any indictment be found against him: nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another: 5. Per-

[f] 2 Hal. P. C. 127.
[g] c. 2. §. 24.
[h] 2 Inst. 189.
[i] *In omnibus placitis de felonia solet accusatus per plegios dimitti, praeterquam in placito de homicidio, ubi ad terrorem aliter statutum est.* (Glanv. *l.* 14. *c.* 1.)
[k] 2 Inst. 186. 2 Hal. P. C. 129.

sons

ſons outlawed: 6. Such as have abjured the realm: 7. Ap-
[299] provers, of whom we ſhall ſpeak in a ſubſequent chapter, and perſons by them accuſed: 8. Perſons taken with the mainour, or in the fact of felony: 9. Perſons charged with arſon: 10. Excommunicated perſons, taken by writ *de excommunicato capiendo:* all which are clearly not admiſſible to bail by the juſtices. Others are of a dubious nature, as 11. Thieves openly defamed and known: 12. Perſons charged with other felonies, or manifeſt and enormous offences, nor being of good fame: and, 13. Acceſſories to felony, that labour under the ſame want of reputation. Theſe ſeem to be in the diſcretion of the juſtices, whether bailable or not. The laſt claſs are ſuch as *muſt* be bailed upon offering ſufficient ſurety; as, 14. Perſons of good fame, charged with a bare ſuſpicion of manſlaughter, or other inferior homicide: 15. Such perſons, being charged with petit larciny, or any felony not before ſpecified: or, 16. With being acceſſory to any felony. Laſtly, it is agreed that the court[l] of king's bench (or any judge[m] thereof in time of vacation) may bail for any crime whatſoever, be it treaſon[n], murder[o], or any other offence, according to the circumſtance of the caſe. And herein the wiſdom of the law is very manifeſt. To allow bail to be taken commonly for ſuch enormous crimes, would greatly tend to elude the public juſtice: and yet there are caſes, though they rarely happen, in which it would be hard and unjuſt to confine a man in priſon, though accuſed even of the greateſt offence. The law has therefore provided one court, and only one, which has a diſcretionary power of bailing in any caſe: except only, even to this high juriſdiction, and of courſe to all inferior ones, ſuch perſons as are

[l] 2 Inſt. 189. Latch. 12. Vaugh. 157. Comb. 111. 298, 1 Comyns Dig. 495.

[m] Skin. 683. Salk. 105. Stra. 911. 1 Comyns Dig. 497.

[n] In the reign of queen Elizabeth it was the unanimous opinon of the judges, that no court could bail upon a commitment, for a charge of high treaſon by any of the queen's privy council. (1 Anderſ. 298.)

[o] *In omnibus placitis de felonia ſolet accuſatus per plegios dimitti, praeterquam in placito de homicidio.* (Glan. *l.* 14. *c.* 1.) *Sciendum tamen quod, in hoc placito, non ſolet accuſatus per plegios dimitti, niſi ex regiae poteſtatis beneficio.* (*Ibid. c.* 3.)

committed

committed by either houſe of parliament, ſo long as the ſeſſion laſts; or ſuch as are committed for contempts by any of [300] the king's ſuperior courts of juſtice [p].

UPON the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the juſtice, or warrant under his hand and ſeal, containing the cauſe of his commitment; there to abide till delivered by due courſe of law [q]. But this impriſonment, as has been ſaid, is only for ſafe cuſtody, and not for puniſhment: therefore, in this dubious interval between the commitment and trial, a priſoner ought to be uſed with the utmoſt humanity; and neither be loaded with needleſs fetters, or ſubjected to other hardſhips than ſuch as are abſolutely requiſite for the purpoſe of confinement only; though what are ſo requiſite, muſt too often be left to the diſcretion of the gaolers; who are frequently a mercileſs race of men, and, by being converſant in ſcenes of miſery, ſteeled againſt any tender ſenſation. Yet the law (as formerly held) would not juſtify them in fettering a priſoner, unleſs where he was unruly, or had attempted to eſcape [r]: this being the humane language of our antient lawgivers [s], "*cuſtodes poenam "ſibi commiſſorum non augeant, nec eos torqueant; ſed omni "ſaevitia remota, pietateque adhibita, judicia debite exequan-"tur.*"

[p] Staundf. P. C. 73. *b.*
[q] 2 Hal. P. C. 122.
[r] 2 Inſt. 381, 3 Inſt. 34.
[s] Flet. *l.* 1, *c.* 26.

CHAPTER THE TWENTY-THIRD.

OF THE SEVERAL MODES OF PROSECUTION.

THE next ſtep towards the puniſhment of offenders is their proſecution, or the manner of their formal accuſation. And this is either upon a previous finding of the fact by an inqueſt or grand jury; or without ſuch previous finding. The former way is either by *preſentment*, or *indictment*.

I. A PRESENTMENT, *generally* taken, is a very comprehenſive term; including not only preſentments properly ſo called, but alſo inquiſitions of office, and indictments by a grand jury. A preſentment, *properly* ſpeaking, is the notice taken by a grand jury of any offence from their own knowledge or obſervation [a], without any bill of indictment laid before them at the ſuit of the king. As the preſentment of a nuſance, a libel, and the like; upon which the officer of the court muſt afterwards frame an indictment [b], before the party preſented can be put to anſwer it. An inquiſition of office is the act of a jury ſummoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them. Some of theſe are in themſelves convictions, and cannot afterwards be traverſed or denied; and therefore the inqueſt, or jury, ought to hear all that can be alleged on both ſides. Of this nature are all inquiſitions of *felo de ſe*; of flight in perſons accuſed of felony; of deodands,

[a] Lamb. *Eirenarch.* l. 4. c. 5. [b] 2 Inſt. 739.

and

and the like; and presentments of petty offences in the sheriff's tourn or court-leet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed and examined; as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of [302] homicide: for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it; which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely.

II. AN *indictment* [c] is a written accusation of one or more persons of a crime or misdemesnor, preferred to, and presented upon oath by, a grand jury. To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer* and *terminer*, and of general gaol delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord the king shall then and there be commanded them [d]. They ought to be freeholders, but to what amount is uncertain [e]: which seems to be *casus omissus*, and as proper to be supplied by the legislature as the qualifications of the petit jury; which were formerly equally vague and uncertain, but are now settled by several acts of parliament. However, they are usually gentlemen of the best figure in the county. As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three; that twelve may be a majority. Which number, as well as the constitution itself, we find exactly described, so early as the laws of king Ethelred [f]. "*Exeant seniores duo-*"*decim thani, et praefectus cum eis, et jurent super sanctuarium* "*quod eis in manus datur, quod nolint ullum innocentem accu-*"*sare, nec aliquem noxium celare.*" In the time of king Richard the first (according to Hoveden) the process of electing the grand jury, ordained by that prince, was as fol-

[c] See Appendix. § 1.
[d] 2 Hal. P. C. 154.
[e] *Ibid.* 155.
[f] Wilk. *LL. Angl. Sax.* 117.

lows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably
[303] found too large and inconvenient; but the traces of this institution still remain, in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury however ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine, that might be applied to very oppressive purposes[g] (1).

'THE grand jury are sworn to inquire, only for the body of the county, *pro corpore comitatus*; and therefore they cannot regularly inquire of a fact done out of that county for

[g] State Trials, IV. 183.

(1) Upon an indictment for high treason against the earl of Shaftesbury in the year 1681, the evidence was given in public before the grand jury at the Old Bailey; and the gentlemen of the jury expressing some doubts with regard to the legality of the proceeding, lord C. J. Pemberton and C. J. North both declared that it had always been the practice to examine the witnesses publicly before the grand jury, whenever it had been requested by those who prosecuted for the king. 3 *Harg. St. Tr.* 417. But I apprehend this is the last instance of such a procedure.

The grand jury ought never to be assisted by the depositions taken before the magistrate, except where these depositions could be read in evidence to the petty jury. *Denby's case, Leach*, 580.

which

which they are ſworn, unleſs particularly enabled by act of parliament. And to ſo high a nicety was this matter antiently carried, that where a man was wounded in one county, and died in another, the offender was at common law indictable in neither, becauſe no complete act of felony was done in any one of them: but by ſtatute 2 & 3 Edw. VI. c. 24. he is now indictable in the county where the party died. And, by ſtatute 2 Geo. II. c. 21. if the ſtroke or poiſoning be in England, and the death upon the ſea or out of England; or, *vice verſa*; the offenders and their acceſſories may be indicted in the county where either the death, poiſoning, or ſtroke ſhall happen. And ſo in ſome other caſes: as particularly, where treaſon is committed out of the realm, it may be inquired of in any county within the realm, as the king ſhall direct, in purſuance of ſtatutes 26 Hen. VIII. c. 13. 33 Hen. VIII. c. 23. 35 Hen. VIII. c. 2. and 5 & 6 Edw. VI. c. 11. And counterfeiters, waſhers, or miniſhers of the current coin, together with all manner of felons and [304] their acceſſories, may by ſtatute 26 Hen. VIII. c. 6. (confirmed and explained by 34 & 35 Hen. VIII. c. 26. § 75, 76.) be indicted and tried for thoſe offences, if committed in any part [h] of Wales, before the juſtices of gaol delivery and of the peace in the next adjoining county of England, where the king's writ runneth: that is, at preſent in the county of Hereford or Salop; and not, as it ſhould ſeem, in the county of Cheſter or Monmouth: the one being a county palatine where the king's writ did not run, and the other a part of Wales, in 26 Hen. VIII. [i] Murders alſo, whether committed in England or in foreign parts [k], may by virtue of the ſtatute 33 Hen. VIII. c. 23. be inquired of and tried by the king's ſpecial commiſſion in any ſhire or place in the kingdom. By ſtatute 10 & 11 W. III. c. 25. all robberies and other capital crimes, committed in Newfoundland, may be inquired of and tried in any county in England. Offences againſt the black act, 9 Geo. I. c. 22. may be inquired of and tried in any county of England, at the option of the

[h] Stra. 533. 8 Mod. 134.
[i] See Hardr. 66.
[k] Ely's caſe, at the old bailey, Dec. 1720. Roache's caſe, Dec. 1775.

prosecutor[l]. So felonies in destroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may, by statutes 8 Geo. II. c. 20. and 13 Geo. III. c. 84. be inquired of and tried in any adjacent county. By statute 26 Geo. II. c. 19. plundering or stealing from any vessel in distress or wrecked, or breaking any ship contrary to 12 Ann. st. 2. c. 18.[m], may be prosecuted either in the county where the fact is committed, or in any county next adjoining; and, if committed in Wales, then in the next adjoining English county: by which is understood to be meant such English county as, by the statute 26 Hen. VIII. above-mentioned, had before a concurrent jurisdiction with the great sessions of felonies committed in Wales[n]. Felonies committed out
[305] of the realm, in burning or destroying the king's ships, magazines, or stores, may by statute 12 Geo. III. c. 24. be inquired of and tried in any county of England, or in the place where the offence is committed. By statute 13 Geo. III. c. 63. misdemesnors committed in India may be tried upon information or indictment in the court of king's bench in England; and a mode is marked out for examining witnesses by commission, and transmitting their depositions to the court. But, in general, all offences must be inquired into as well as tried in the county where the fact is committed. Yet if larciny be committed in one county, and the goods carried into another, the offender may be indicted in either; for the offence is complete in both[o]. Or, he may be indicted in England for larciny in Scotland, and carrying the goods with him into England, or *vice versa*; or for receiving in one part of the united kingdoms goods that have been stolen in another[p]. But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed: for though

[l] So held by all the judges, H. 11 Geo. III. in the case of Richard Mortis on a case referred from the old bailey.

[m] See page 244.

[n] At Shrewsbury summer assizes, 1774, Parry and Roberts were convicted of plundering a vessel which was wrecked on the coast of Anglesey. It was moved in arrest of judgment, that Chester and not Salop was the next adjoining English county. But all the judges (in Mich. 15 Geo. III.) held the prosecution to be regular.

[o] 1. Hal. P. C. 507.

[p] Stat. 13 Geo. III. c. 31.

the

the carrying away and keeping of the goods is a continuation of the original taking. and is therefore larciny in the second county, yet it is not a robbery or burglary in that jurisdiction. And if a person be indicted in one county for larciny of goods originally taken in another, and be thereof convicted or stands mute, he shall not be admitted to his clergy; provided the original taking be attended with such circumstances, as would have ousted him of his clergy by virtue of any statute made previous to the year 1691 [q](2).

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, "*ignoramus*;" or, we know nothing of it; intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English, more absolutely "not a true bill;" or (which is the better way) "not found;" and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then endorse upon it, "a true bill;" antiently, "*billa vera*." [306] The indictment is then said to be found, and the party stands indicted. But to find a bill there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree [r]. And the indictment, when so found, is publicly delivered into court.

[q] Stat. 25 Hen. VIII. c. 3. 3 W. & M. c. 9.

[r] 2 Hal. P. C. 161.

(2) Bigamy may be tried either in the county where the offence is committed, or where the offender is apprehended, 1 *Jac. I.* c. 11.

INDICTMENTS must have a precise and sufficient certainty. By statute 1 Hen. V. c. 5. all indictments must set forth the christian name, surname, and addition of the state and degree, mystery, town, or place, and the county of the offender: and all this to identify his *person*. The *time*, and *place*, are also to be ascertained, by naming the day, and township, in which the fact was committed: though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the indictment, and the *place* to be within the jurisdiction of the court; unless where the place is laid, not merely as a *venue*, but as part of the description of the fact [f]. But sometimes the *time* may be very material, where there is any limitation in point of time assigned for the prosecution of offenders; as by the statute 7 Will. III. c. 3. which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned, (except an assassination designed or attempted on the person of the king,) unless the bill of indictment be found within three years after the offence committed [s]: and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offence itself must also be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains
[307] of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, "treasonably, and against his allegiance;" antiently, "*proditorie et contra ligeantiae suae debitum*:" else the indictment is void. In indictments for murder, it is necessary to say that the party indicted "murdered," not "killed," or "slew," the other; which till the late statute was expressed in Latin by the word "*murdravit* [t]." In all indictments for felonies, the adverb "feloniously, *felonice*," must be used; and for burglaries also, "*burglariter*," or in English, "burglariously:" and all these to ascertain the intent. In rapes, the word "*rapuit*," or "ravished," is

[f] 2 Hawk. P. C. 435.
[s] Foft. 249.
[t] See Vol. III. pag. 321.

necessary,

neceſſary, and muſt not be expreſſed by any periphraſis; in order to render the crime certain. So in larcinies alſo, the words "*felonice cepit et aſportavit*, feloniouſly took and carried "away;" are neceſſary to every indictment; for theſe only can expreſs the very offence. Alſo in indictments for murder, the length and depth of the wound ſhould in general be expreſſed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then it's dimenſions are immaterial, for that is apparently ſufficient to have been the cauſe of the death. Alſo, where a limb, or the like, is abſolutely cut off, there ſuch deſcription is impoſſible [u]. Laſtly, in indictments, the *value* of the thing, which is the ſubject or inſtrument of the offence, muſt ſometimes be expreſſed. In indictments for larcinies this is neceſſary, that it may appear whether it be grand or petit larciny; and whether entitled or not to the benefit of clergy: in homicide of all ſorts it is neceſſary; as the weapon with which it is committed is forfeited to the king as a deodand.

THE remaining methods of proſecution are without any previous finding by a jury, to fix the authoritative ſtamp of veriſimilitude upon the accuſation. One of theſe, by the common law, was when a thief was taken *with the mainour*, that is, with the thing ſtolen upon him *in manu*. For he might, when ſo detected *flagrante delicto*, be brought into court, arraigned, and tried, without indictment: as by the Daniſh law he might be taken and hanged upon the ſpot, without accuſation or trial [w]. But this proceeding was taken away by ſeveral ſtatutes in the reign of Edward the third [x]: though in Scotland a ſimilar proceſs remains to this day [y]. So that the only ſpecies of proceeding at the ſuit of the king, without a previous indictment or preſentment by a grand jury, now ſeems to be that of *information*. [308]

III. INFORMATIONS are of two ſorts; firſt, thoſe which are partly at the ſuit of the king, and partly at that of a ſub-

[u] 5 Rep. 122.
[w] Stiern. *de jure Sueon. l.* 3. *c.* 5.
[x] 2 Hal. P. C. 149.
[y] Lord Kaims. I. 331.

ject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer; and are a sort of *qui tam* actions, (the nature of which was explained in a former volume [z],) only carried on by a criminal instead of a civil process: upon which I shall therefore only observe, that by the statute 31 Eliz. c. 5. no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offence; nor on behalf of the crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offence.

THE informations that are exhibited in the name of the king alone, are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney general: secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer: and they are filed by the king's coroner and attorney in the court of king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed *ex officio* by his own attorney general, are properly such enor-
[309] mous misdemesnors, as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal: which power, thus necessary, not only to the ease and safety, but even to the

[z] See Vol. III. pag. 162.

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very exiſtence of the executive magiſtrate, was originally reſerved in the great plan of the Engliſh conſtitution, wherein proviſion is wiſely made for the due preſervation of all it's parts. The objects of the other ſpecies of informations, filed by the maſter of the crown-office upon the complaint or relation of a private ſubject, are any groſs and notorious miſdemeſnors, riots, batteries, libels, and other immoralities of an atrocious kind [a], not peculiarly tending to diſturb the government, (for thoſe are left to the care of the attorney general,) but which, on account of their magnitude or pernicious example, deſerve the moſt public animadverſion. And when an information is filed, either thus, or by the attorney general *ex officio*, it muſt be tried by a petit jury of the county where the offence ariſes: after which, if the defendant be found guilty, the court muſt be reſorted to for his puniſhment (3).

[a] 2 Hawk. P. C. 260.

(3) If an information, or an indictment for a miſdemeanour removed into the court of king's bench by certiorari, be not of ſuch importance as to be tried at the bar of the court, it is ſent down by writ of *niſi prius* into the county where the crime is charged to have been committed, and it is there tried either by a common or a ſpecial jury, like a record in a civil action; and if the defendant is found guilty, he muſt afterwards receive judgment from the court of king's bench. But where an indictment for treaſon or felony is removed by *certiorari*, the law upon the ſubject ſeems to be fully ſtated by Lord Hale in the two following ſections. 2 *P. C.* 41.

"As to an indictment of felony or treaſon removed out of the "county by *certiorari*, and the party pleading, the record is ſent "down by *niſi prius* to be tried; the judges of *niſi prius* may "upon that record proceed to trial, and judgment, and execu-"tion, as if they were juſtices of gaol-delivery by virtue of the "ſtatute of 14 *H. VI. cap.* 1."

"But if there were any queſtion upon that ſtatute, yet the "ſtatute of 6 *H. VIII. cap.* 6. which extends to all juſtices and "commiſſioners, as well of thoſe of gaol-delivery and of the "peace, enables the court of king's bench to ſend to them the

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THERE can be no doubt but that this mode of profecution, by information, (or fuggeſtion,) filed on record by the king's attorney general, or by his coroner or maſter of the crown-office in the court of king's bench, is as antient as the common law itſelf[b]. For as the king was bound to proſecute, or at leaſt to lend the ſanction of his name to a proſecutor, whenever a grand jury informed him upon their oaths that there was a ſufficient ground for inſtituting a criminal ſuit; ſo, when theſe his immediate officers were otherwiſe ſufficiently aſſured that a man had committed a groſs miſdemeſnor, either perſonally againſt the king or his government, or againſt the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of king's bench by a
[310] fuggeſtion on record, and to carry on the proſecution in his majeſty's name. But theſe informations (of every kind) are confined by the conſtitutional law to mere miſdemeſnors only: for, wherever any capital offence is charged, the ſame law requires that the accuſation be warranted by the oath of twelve men, before the party ſhall be put to anſwer it. And, as to thoſe offences, in which informations were allowed as well as indictments, ſo long as they were confined to this high and reſpectable juriſdiction, and were carried on in a legal and regular courſe in his majeſty's court of king's bench, the ſubject had no reaſon to complain. The ſame notice was given, the ſame proceſs was iſſued, the ſame pleas

[b] 1 Show. 118.

"very record itſelf, and by ſpecial writ or mandate to command "them to proceed to trial and judgment, upon ſuch iſſue joined; "as they may command the juſtices, before whom the indict-"ment was taken, to proceed to hear and determine the ſame, "if no ſuch iſſue were joined." See Sir Miles Stapleton's caſe, *Raym.* 367.

If the treaſon or felony is to be tried at *niſi prius* under the 14 *Hen. VI. c.* 1. then the court ſends a tranſcript of the record, and not the record itſelf. 2 *Hal. P. C.* 3. 4 *Co.* 74.

were allowed, the ſame trial by jury was had, the ſame judgment was given by the ſame judges, as if the proſecution had originally been by indictment. But when the ſtatute 3 Hen. VII. c. 1. had extended the juriſdiction of the court of ſtar-chamber, the members of which were the ſole judges of the law, the fact, and the penalty; and when the ſtatute 11 Hen. VII. c. 3. had permitted informations to be brought by any informer upon any penal ſtatute, not extending to life or member, at the aſſiſes or before the juſtices of the peace, who were to hear and determine the ſame according to their own diſcretion; then it was, that the legal and orderly juriſdiction of the court of king's bench fell into diſuſe and oblivion, and Empſon and Dudley (the wicked inſtruments of king Henry VII.) by hunting out obſolete penalties, and this tyrannical mode of proſecution, with other oppreſſive devices [c], continually haraſſed the ſubject and ſhamefully enriched the crown. The latter of theſe acts was ſoon indeed repealed by ſtatute 1 Hen. VIII. c. 6. but the court of ſtar-chamber continued in high vigour, and daily increaſing it's authority, for more than a century longer; till finally aboliſhed by ſtatute 16 Car. I. c. 10.

Upon this diſſolution the old common law [d] authority of the court of king's bench, as the *cuſtos morum* of the nation, being found neceſſary to reſide ſomewhere for the peace and good government of the kingdom, was again revived in practice [e]. And it is obſervable, that in the ſame act of parliament which aboliſhed the court of ſtar-chamber, a conviction by information is expreſsly reckoned up, as one of the legal modes of conviction of ſuch perſons as ſhould offend a third time againſt the proviſions of that ſtatute [f]. It is true, ſir Matthew Hale, who preſided in this court ſoon after the time of ſuch revival, is ſaid [g] to have been no friend to this method of proſecution: and, if ſo, the reaſon of ſuch [311]

[c] 1 And. 157.
[d] 5 Mod. 464.
[e] Styl. Rep. 217, 245. Styl. pract. Reg. *tit.* Information. pag. 187. (edit. 1657.) 2 Sid. 71. 1 Sid. 152.
[f] Stat. 16 Car. I. c. 10. §. 6.
[g] 5 Mod. 460.

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his diſlike was probably the ill uſe which the maſter of the crown-office then made of his authority, by permitting the ſubject to be haraſſed with vexatious informations, whenever applied to by any malicious or revengeful proſecutor; rather than his doubt of their legality, or propriety upon urgent occaſions [h]. For the power of filing informations, without any control, then reſided in the breaſt of the maſter; and, being filed in the name of the king, they ſubjected the proſecutor to no coſts, though on trial they proved to be groundleſs. This oppreſſive uſe of them, in the times preceding the revolution, occaſioned a ſtruggle, ſoon after the acceſſion of king William [i], to procure a declaration of their illegality by the judgment of the court of king's bench. But ſir John Holt, who then preſided there, and all the judges, were clearly of opinion, that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was applied in parliament, by ſtatute 4 & 5 W. & M. c. 18. which enacts, that the clerk of the crown ſhall not file any information without expreſs direction from the court of king's bench: and that every proſecutor, permitted to promote ſuch information, ſhall give ſecurity by a recognizance of twenty pounds (which now ſeems to be too ſmall a ſum) to proſecute the ſame with effect; and to pay coſts to the defendant, in caſe he be acquitted thereon, unleſs the judge, who tries the information, ſhall certify there was reaſonable cauſe for filing it; and, at all events, to pay coſts, unleſs
[312] the information ſhall be tried within a year after iſſue joined. But there is a proviſo in this act, that it ſhall not extend to any other informations than thoſe which are exhibited by the maſter of the crown-office: and, conſequently, informations at the king's own ſuit, filed by his attorney general, are no way reſtrained thereby.

THERE is one ſpecies of informations, ſtill farther regulated by ſtatute 9 Ann. c. 20. *viz.* thoſe in the nature of a

[h] 1 Saund. 301. 1 Sid. 174. 141. Far. 361. 1 Show. 106.
[i] M. 1 W. & M. 5 Mod. 459. Comb.

writ of *quo warranto*; which was ſhewn, in the preceding volume [k], to be a remedy given to the crown againſt ſuch as had uſurped or intruded into any office or franchiſe. The modern information tends to the ſame purpoſe as the antient writ, being generally made uſe of to try the civil rights of ſuch franchiſes; though it is commenced in the ſame manner as other informations are, by leave of the court, or at the will of the attorney general: being properly a criminal proſecution, in order to fine the defendant for his uſurpation, as well as to ouſt him from his office; yet uſually conſidered at preſent as merely a civil proceeding (4).

THESE are all the methods of proſecution at the ſuit of the king. There yet remains another, which is merely at the ſuit of the ſubject, and is called an *appeal*.

IV. AN appeal, in the ſenſe wherein it is here uſed, does not ſignify any complaint to a ſuperior court of an injuſtice done by an inferior one, which is the general uſe of the word; but it here means an original ſuit, at the time of it's firſt commencement [l]. An appeal therefore, when ſpoken of as a criminal proſecution, denotes an accuſation by a private ſubject againſt another, for ſome heinous crime; demanding puniſhment on account of the particular injury ſuffered, rather than for the offence againſt the public. As this method of proſecution is ſtill in force, I cannot omit to mention it: but as it is very little in uſe, on account of the great nicety required in conducting it, I ſhall treat of it very briefly; [313]

[k] See Vol. III. pag. 262.

[l] It is derived from the French, "*appeller*," the verb active, which ſignifies to call upon, ſummon, or challenge one; and not the verb neuter, which ſignifies the ſame as the ordinary ſenſe of "appeal" in Engliſh.

(4) Becauſe an information in the nature of a *quo warranto* is conſidered merely as a civil proceeding, the court of king's bench will grant a new trial, though the verdict ſhould have been given for the defendant. 2 *T. R.* 484.

briefly; referring the ſtudent for more particulars to other more voluminous compilations[m].

THIS private proceſs, for the puniſhment of public crimes, had probably its original in thoſe times when a private pecuniary ſatisfaction, called a *weregild*, was conſtantly paid to the party injured, or his relations, to expiate enormous offences. This was a cuſtom derived to us, in common with other northern nations[n], from our anceſtors, the antient Germans; among whom, according to Tacitus[o], "*luitur homicidium certo armentorum ac pecorum numero; reci-*" *pitque ſatisfactionem univerſa domus*[p]." In the ſame manner by the Iriſh Brehon law, in caſe of murder, the Brehon or judge was uſed to compound between the murderer and the friends of the deceaſed who proſecuted him, by cauſing the malefactor to give unto them, or to the child or wife of him that was ſlain, a recompence which they called an *eriach*[q]. And thus we find in our Saxon laws (particularly thoſe of king Athelſtan[r]) the ſeveral weregilds for homicide eſtabliſhed in progreſſive order, from the death of the ceorl or peaſant, up to that of the king himſelf[s]. And in the laws of king Henry I.[t], we have an account of what other offences were then redeemable by weregild, and what were not ſo[u]. As therefore, during the continuance of this cuſ-

[m] 2 Hawk. P. C. ch. 23.

[n] Stiernh. *de jure Sueon. l.* 3. *c.* 4.

[o] *De M. G. c.* 21.

[p] And in another place. (*c.* 12.) "*Delictis, pro modo poenarum, equorum* "*pecorumque numero convicti mulctan-*" *tur. Pars mulctae regi vel civitati;* "*pars ipſi qui vindicatur, vel propinquis* "*ejus exſolvitur.*"

[q] Spenſer's ſtate of Ireland, p. 1513. *edit.* Hughes.

[r] *Judic. Civit. Lund.* Wilk. 71.

[s] The weregild of a ceorl was 266 thryſmas, that of the king 30,000; each thryſma being equal to about a ſhilling of our preſent money. The weregild of a ſubject was paid entirely to the relations of the party ſlain; but that of the king was divided; one half being paid to the public, the other to the royal family.

[t] *c.* 12.

[u] In Turkey this principle is ſtill carried ſo far, that even murder is never proſecuted by the officers of the government, as with us. It is the buſineſs of the next relations, and them only, to revenge the ſlaughter of their kinſmen; and if they rather chooſe (as they generally do) to compound the matter for money, nothing more is ſaid about it. (Lady M. W. Montague, lett. 42.)

tom,

tom, a proceſs was certainly given, for recovering the were-gild by the party to whom it was due; it ſeems that, when theſe offences by degrees grew no longer redeemable, the [314] private proceſs was ſtill continued, in order to inſure the infliction of puniſhment upon the offender, though the party injured was allowed no pecuniary compenſation for the offence.

BUT, though appeals were thus in the nature of proſecutions for ſome atrocious injury committed more immediately againſt an individual, yet it alſo was antiently permitted, that any ſubject might appeal another ſubject of high treaſon, either in the courts of common law[w], or in parliament, or (for treaſons committed beyond the ſeas) in the court of the high conſtable and marſhal. The cognizance of appeals in the latter ſtill continues in force; and ſo late as 1631 there was a trial by battel awarded in the court of chivalry, on ſuch an appeal of treaſon[x]: but that in the firſt was *virtually* aboliſhed[y] by the ſtatutes 5 Edw. III. c. 9. and 25 Edw. III. c. 24. and in the ſecond *expreſsly* by ſtatute 1 Hen. IV. c. 14. So that the only appeals now in force, for things done within the realm, are appeals of felony and mayhem.

AN appeal of *felony* may be brought for crimes committed either againſt the parties themſelves, or their relations. The crimes againſt the parties themſelves are *larciny*, *rape*, and *arſon*. And for theſe, as well as for mayhem, the perſons robbed, raviſhed, maimed, or whoſe houſes are burnt, may inſtitute this private proceſs. The only crime againſt one's relation, for which an appeal can be brought, is that of *killing* him, by either murder or manſlaughter. But this cannot be brought by every relation: but only by the wife for the death of her huſband, or by the heir male for the death of his anceſtor; which heirſhip was alſo confined, by an ordinance of king Henry the firſt, to the four neareſt degrees

[w] Britt. c. 22.

[x] By Donald lord Rae againſt David Ramſey. (Ruſhw. vol. 2. part 2. p. 112.)

[y] 1 Hal. P. C. 349.

of

of blood[z]. It is given to the wife, on account of the loſs of her huſband: therefore, if ſhe marries again, before or pending her appeal, it is loſt and gone; or, if ſhe marries after judgment, ſhe ſhall not demand execution. The heir, as was ſaid, muſt alſo be heir male, and ſuch a one as was
[315] the next heir by the courſe of the common law, at the time of the killing of the anceſtor. But this rule has three exceptions: 1. If the perſon killed leaves an innocent wife, ſhe only, and not the heir, ſhall have the appeal: 2. If there be no wife, and the heir be accuſed of the murder, the perſon, who next to him would have been heir male, ſhall bring the appeal: 3. If the wife kills her huſband, the heir may appeal her of the death. And, by the ſtatute of Glouceſter, 6 Edw. I. c. 9. all appeals of death muſt be ſued within a year and a day after the completion of the felony by the death of the party: which ſeems to be only declaratory of the old common law; for in the Gothic conſtitutions we find the ſame "*praeſcriptio annalis, quae currit adverſus ac-*
"*torem, ſi de homicida ei non conſtet intra annum a caede facta,*
"*nec quenquam interea arguat et accuſet*[a]."

THESE appeals may be brought, previous to any indictment: and if the appellee be acquitted thereon, he cannot be afterwards indicted for the ſame offence. In like manner as by the old Gothic conſtitution, if any offender gained a verdict in his favour, when proſecuted by the party injured, he was alſo underſtood to be acquitted of any crown proſecution for the ſame offence[b]: but, on the contrary, if he made his peace with the king, ſtill he might be proſecuted at the ſuit of the party. And ſo, with us, if a man be acquitted on an indictment of murder, or found guilty, and pardoned by the king, ſtill he ought not (in ſtrictneſs) to go at large, but be impriſoned or let to bail till the year and day be paſt, by virtue of the ſtatute 3 Hen. VII. c. 1. in order to be forthcoming to anſwer any appeal for the ſame felony,

[z] Mirr. c. 2. § 7.
[a] Stiernh. *de jure Goth. l.* 3. *c.* 4.
[b] *Ibid. l.* 1. *c.* 5.

not

not having as yet been punished for it: though, if he hath been found guilty of manslaughter on an indictment, and hath had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed; for it is a maxim in law, "that *nemo bis punitur pro eodem delicto*." Before this statute was made, it was not usual to indict a man for homicide within the time limited for appeals; which produced very great inconvenience, of which more hereafter[c].

[316] If the appellee be acquitted, the appellor (by virtue of the statute of Westm. 2. 13 Edw. I. c. 12.) shall suffer one year's imprisonment, and pay a fine to the king, besides restitution of damages to the party for the imprisonment and infamy which he has sustained: and, if the appellor be incapable to make restitution, his abettors shall do it for him, and also be liable to imprisonment. This provision, as was foreseen by the author of Fleta[d], proved a great discouragement to appeals; so that thenceforward they ceased to be in common use.

If the appellee be found guilty, he shall suffer the same judgment, as if he had been convicted by indictment: but with this remarkable difference; that on an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject, to make an atonement for the private wrong, the king can no more pardon it, than he can remit the damages recovered on an action of battery[e]. In like manner as, while the weregild continued to be paid as a fine for homicide, it could not be remitted by the king's authority[f]. And the antient usage was, so late as Henry the fourth's time, that all the relations of the slain should drag the appellee to the place of execution[g]: a custom, founded upon that savage spirit of family resentment, which prevailed universally through Europe after the irruption of the northern

[c] See pag. 335.
[d] *l.* 1. *c.* 34. § 48.
[e] 2 Hawk. P. C. 392.
[f] *LL. Edm.* § 3.
[g] *M.* 11 *Hen. IV.* 12. 3 Inst. 131.

nations, and is peculiarly attended to in their ſeveral codes of law; and which prevails even now among the wild and untutored inhabitants of America: as if the finger of nature had pointed it out to mankind, in their rude and uncultivated ſtate[h]. However, the puniſhment of the offender may be remitted and diſcharged by the concurrence of all parties intereſted; and as the king by his pardon may fruſtrate an indictment, ſo the appellant by his releaſe may diſ-
[317] charge an appeal[i]: "*nam quilibet poteſt renunciare juri pro ſe* "*introducto* (5)."

THESE are the ſeveral methods of proſecution inſtituted by the laws of England for the puniſhment of offences; of which that by indictment is the moſt general. I ſhall therefore confine my ſubſequent obſervations principally to this method of proſecution; remarking by the way the moſt material variations that may ariſe, from the method of proceeding by either information or appeal.

[h] Robertſon. Cha. V. i. 45. [i] 1 Hal. P. C. 9.

(5) Some appeals of late years have been commenced, but not proſecuted with effect. 5 *Burr.* 2643. They have probably been compromiſed, as the chief object of an appeal in all times was to compel the defendant to make a pecuniary compenſation. For when the verdict in an appeal was given in favour of the appellant, he might inſiſt upon what terms he pleaſed as the ranſom of the defendant's life, or a commutation of the ſentence. In an appeal, in which the defendant was found guilty of manſlaughter, it was doubted whether the king could pardon the burning in the hand, and the defendant compounded with the appellant for 40 marks. 3 *P. Wms.* 453.

CHAPTER THE TWENTY-FOURTH.

OF PROCESS UPON AN INDICTMENT.

WE are next, in the fourth place, to inquire into the manner of iſſuing *proceſs*, after indictment found, to bring in the accuſed to anſwer it. We have hitherto ſuppoſed the offender to be in cuſtody before the finding of the indictment; in which caſe he is immediately (or as ſoon as convenience permits) to be arraigned thereon. But if he hath fled, or ſecretes himſelf, in capital caſes; or hath not, in ſmaller miſdemeſnors, been bound over to appear at the aſſiſes or ſeſſions, ſtill an indictment may be preferred againſt him in his abſence; ſince, were he preſent, he could not be heard before the grand jury againſt it. And, if it be found, then proceſs muſt iſſue to bring him into court; for the indictment cannot be tried, unleſs he perſonally appears: according to the rules of equity in all caſes, and the expreſs proviſion of ſtatute 28 Edw. III. c. 3. in capital ones, that no man ſhall be put to death, without being brought to anſwer by due proceſs of law.

THE proper proceſs on an indictment for any petit miſdemeſnor, or on a penal ſtatute, is a writ of *venire facias*, which is in the nature of a ſummons to cauſe the party to appear. And if by the return to ſuch *venire* it appears, that the party hath lands in the county whereby he may be diſtreined, then a *diſtreſs infinite* ſhall be iſſued from time to time till he ap-

pears. But if the ſheriff returns that he hath no lands in his bailiwick, then (upon his non-appearance) a writ of *capias* [319] ſhall iſſue, which commands the ſheriff to take his body, and have him at the next aſſiſes; and if he cannot be taken upon the firſt *capias*, a ſecond and a third ſhall iſſue, called an *alias*, and a *pluries capias*. But, on indictments for treaſon or felony, a *capias* is the firſt proceſs; and for treaſon or homicide, only one ſhall be allowed to iſſue[a], or two in the caſe of other felonies, by ſtatute 25 Edw. III. c. 14. though the uſage is to iſſue only one in any felony; the proviſions of this ſtatute being in moſt caſes found impracticable[b]. And ſo, in the caſe of miſdemeſnors, it is now the uſual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. But if he abſconds, and it is thought proper to purſue him to an outlawry, then a greater exactneſs is neceſſary. For, in ſuch caſe, after the ſeveral writs have iſſued in a regular number, according to the nature of the reſpective crimes, without any effect, the offender ſhall be put in the *exigent* in order to his outlawry: that is, he ſhall be exacted, proclaimed, or required to ſurrender, at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requiſition, then he is adjudged to be *outlawed*, or put out of the protection of the law; ſo that he is incapable of taking the benefit of it in any reſpect, either by bringing actions or otherwiſe.

THE puniſhment, for outlawries upon indictments for miſdemeſnors, is the ſame as for outlawries upon civil actions; (of which, and the previous proceſs by writs of *capias*, *exigi facias*, and *proclamation*, we ſpoke in the preceding book[c];) *viz.* forfeiture of goods and chattels. But an outlawry in treaſon or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender

[a] See Append. § 1.

[b] 2 Hal. P. C. 195.

[c] See Vol. III. p. 283, 4.

had

had been found guilty by his country[d](1). His life is however ſtill under the protection of the law, as hath formerly been obſerved[e]: ſo that though antiently an outlawed felon was ſaid [320] to have *caput lupinum*, and might be knocked on the head like a wolf, by any one that ſhould meet him[f]; becauſe, having renounced all law, he was to be dealt with as in a ſtate of nature, when every one that ſhould find him might ſlay him: yet now, to avoid ſuch inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in ſo doing is guilty of murder[g], unleſs it happens in the endeavour to apprehend him[h]. For any perſon may arreſt an outlaw on a criminal proſecution, either of his own head, or by writ or warrant of *capias utlagatum*, in order to bring him to execution. But ſuch outlawry may be frequently reverſed by writ of error; the proceedings therein being (as it is fit they ſhould be) exceedingly nice and circumſtantial; and, if any ſingle minute point be omitted or miſconducted, the whole outlawry is illegal, and may be reverſed: upon which reverſal the party accuſed is admitted to plead to, and defend himſelf againſt, the indictment.

THUS much for proceſs to bring in the offender after indictment found: during which ſtage of the proſecution it is, that writs of *certiorari facias* are uſually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal juriſdiction into the court of king's bench; which is the ſovereign ordinary court of juſtice in cauſes cri-

[d] 2 Hal. P. C. 205.
[e] See pag. 178.
[f] Mirr. c. 4. § 4. Co. Litt. 128.
[g] 1 Hal. P. C. 497.
[h] Bracton. *fol.* 125.

(1) In moſt caſes now in which a perſon convicted by a verdict is deprived of clergy, a perſon outlawed will alſo be ouſted of clergy, yet ſome few inſtances may perhaps ſtill remain where a perſon outlawed will have clergy, though if he had been tried for the ſame offence, he would have been capitally convicted. See *Foſter*, 358. 2 *Leach. Hawk.* 481. 4 *T. R.* 543.

minal. And this is frequently done for one of these four purposes; either, 1. To consider and determine the validity of appeals or indictments and the proceedings thereon; and to quash or confirm them as there is cause: or, 2. Where it is surmised that a partial or insufficient trial will probably be had in the court below, the indictment is removed, in order to have the prisoner or defendant tried at the bar of the court of king's bench, or before the justices of *nisi prius*: or, 3. It is so removed, in order to plead the king's pardon there: or, 4. To issue process of outlawry against the offender, in those
[321] counties or places where the process of the inferior judges will not reach him[i]. Such writ of *certiorari*, when issued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwise, supersedes the jurisdiction of such inferior court, and makes all subsequent proceedings therein entirely erroneous and illegal; unless the court of king's bench remands the record to the court below, to be there tried and determined. A *certiorari* may be granted at the instance of either the prosecutor or the defendant: the former as a matter of right, the latter as a matter of discretion; and therefore it is seldom granted to remove indictments from the justices of gaol delivery, or after issue joined or confession of the fact in any of the courts below[k].

AT this stage of prosecution also it is, that indictments found by the grand jury against a peer must in consequence of a writ of *certiorari* be certified and transmitted into the court of parliament, or into that of the lord high steward of Great Britain; and that, in places of exclusive jurisdiction, as the two universities, indictments must be delivered (upon challenge and claim of cognizance) to the courts therein established by charter, and confirmed by act of parliament, to be there respectively tried and determined.

[i] 2 Hal. P. C. 210. [k] 2 Hawk. P. C. 287. 4 Burr. 749.

CHAPTER THE TWENTY-FIFTH.

OF ARRAIGNMENT AND IT'S INCIDENTS.

WHEN the offender either appears voluntarily to an indictment, or was before in cuſtody, or is brought in upon criminal proceſs to anſwer it in the proper court, he is immediately to be *arraigned* thereon; which is the fifth ſtage of criminal proſecution.

To arraign, is nothing elſe but to call the priſoner to the bar of the court, to anſwer the matter charged upon him in the indictment[a] (1). The priſoner is to be called to the bar by his name; and it is laid down in our antient books[b], that though under an indictment of the higheſt nature, he muſt be brought to the bar without irons, or any manner of ſhackles or bonds; unleſs there be evident danger of an eſcape, and then he may be ſecured with irons. But yet in Layer's caſe, *A. D.* 1722, a difference was taken between the time of arraignment, and the time of trial; and accordingly the priſoner ſtood at the bar in chains during the time of his arraignment[c] (2).

[a] 2 Hal. P. C. 216.
[b] Bract. *l.* 3. *de coron. c.* 18. § 3. Mirr. *c.* 5. *ſ.* 1. § 54. Flet. *l.* 1. *c.* 31. § 1. Brit. *c.* 5. Staundf. P. C. 78. 3 Inſt. 34. Kel. 10. 2 Hal. P. C. 219. 2 Hawk. P. C. 308.
[c] State Trials. VI. 230.

(1) This word in Latin (Lord Hale ſays) is no other than *ad rationem ponere*, and in French *ad reſon*, or abbreviated *a reſn.* 2 H. P. C. 216.

(2) And it has ſince been held that the court has no authority to order the irons to be taken off, till the priſoner has pleaded, and the jury are charged to try him. *Waite's* Caſe, *Leach*, 34.

WHEN he is brought to the bar, he is called upon by name to hold up his hand: which though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand *constat de persona*, and he owns himself to be of that name by which he is called [d]. However, it is not an indispensable ceremony; for being calculated merely for the purpose of identifying the person, any other acknowlegement will answer the purpose as well: therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient [e].

THEN the indictment is to be read to him distinctly in the English tongue, (which was law, even while all other proceedings were in Latin,) that he may fully understand his charge. After which it is to be demanded of him, whether he be guilty of the crime whereof he stands indicted, or not guilty. By the old common law the accessory could not be arraigned till the principal was attainted; unless he chose it, for he might waive the benefit of the law: and therefore principal and accessory might, and may still, be arraigned, and plead, and also be tried together. But otherwise, if the principal had never been indicted at all, and stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned: for *non constitit* whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen, where it was possible, that a trial of the principal might be had, subsequent to that of the accessory: and therefore the law still continues that the accessory shall not be tried, so long as the principal remains liable to be tried hereafter. But by statute

[d] 2 Hal. P. C. 219. [e] Raym. 408.

1 Ann. c. 9. if the principal be once convicted, and before attainder, (that is, before he receives judgment of death or outlawry,) he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal ſtands mute, or challenges peremptorily above the legal number of jurors, ſo as never to be convicted at all; in any of theſe caſes, in which no ſubſequent trial can be had of the principal, the acceſſory may be proceeded againſt, as if the principal felon had been attainted: for there is no danger of future contradiction. And upon the trial of the acceſſory, as well after as before the conviction of the principal, it ſeems to be the better opinion, and founded on the true ſpirit of juſtice[f], that the acceſſory is at liberty (if he can) to controvert the guilt of his ſuppoſed principal, and to prove him innocent of the charge, as well in point of fact as in point of law.

WHEN a criminal is arraigned, he either *ſtands mute*, or *confeſſes* the fact; which circumſtances we may call *incidents* to the arraignment: or elſe he *pleads* to the indictment, which is to be conſidered as the next ſtage of proceedings. But firſt, let us obſerve theſe incidents to the arraignment, of ſtanding mute, or confeſſion.

I. REGULARLY a priſoner is ſaid to ſtand mute, when, being arraigned for treaſon or felony, he either, 1. Makes no anſwer at all: or, 2. Anſwers foreign to the purpoſe, or with ſuch matter as is not allowable; and will not anſwer otherwiſe: or, 3. Upon having pleaded not guilty, refuſes to put himſelf upon the country[g]. If he ſays nothing, the court ought *ex officio* to impannel a jury to inquire whether he ſtands obſtinately mute, or whether he be dumb *ex viſitatione Dei*. If the latter appears to be the caſe, the judges of the court (who are to be of counſel for the priſoner, and to ſee that he hath law and juſtice) ſhall proceed to the trial, and examine all points as if he had pleaded not guilty[h]. But whether judgment of death can be given againſt ſuch a pri-

[f] Foſter, 365, &c.
[g] 2 Hal. P. C. 316.
[h] 2 Hawk. P. C. 327.

ſoner,

ſoner, who hath never pleaded, and can ſay nothing in arreſt of judgment, is a point yet undetermined [i].

IF he be found to be obſtinately mute, (which a priſoner hath been held to be, that hath cut out his own tongue [k],) then, if it be on an indictment of high treaſon, it hath long been clearly ſettled, that ſtanding mute is an equivalent to a conviction, and he ſhall receive the ſame judgment and execution [l]. And as in this the higheſt crime, ſo alſo in the loweſt ſpecies of felony, *viz.* in petit larciny, and in all miſdemeſnors, ſtanding mute hath always been equivalent to conviction. But upon appeals or indictments for other felonies, or petit treaſon, the priſoner was not, by the antient law, looked upon as convicted, ſo as to receive judgment for the felony; but ſhould, for his obſtinacy, have received the terrible ſentence of *penance*, or *peine* (which, as will appear preſently, was probably nothing more than a corrupted abbreviation of *priſone) forte et dure*.

BEFORE this was pronounced the priſoner had not only *trina admonitio*, but alſo a reſpite of a few hours, and the ſentence was diſtinctly read to him, that he might know his danger [m]: and, after all, if he continued obſtinate, and his offence was clergyable, he had the benefit of his clergy allowed him, even though he was too ſtubborn to pray it [n]. Thus tender was the law of inflicting this dreadful puniſhment: but if no other means could prevail, and the priſoner (when charged with a capital felony) continued ſtubbornly mute, the judgment was then given againſt him, without any diſtinction of ſex or degree. A judgment, which was purpoſely ordained to be exquiſitely ſevere, that by that very means it might rarely be put in execution (3).

[i] 2 Hal. P. C. 317.
[k] 3 Inſt. 178.
[l] 2 Hawk. P. C. 329. 2 Hal. P. C. 317.
[m] 2 Hal. P. C. 320.
[n] 2 Hal. P. C. 321. 2 Hawk. P. C. 332.

(3) Aulus Gellius with more truth has made the ſame obſervation upon the cruel law of the Twelve Tables *De inope debitore ſecando*, "*Eo conſilio tanta immanitas pœnæ denunciata eſt, ne ad eam unquam*

THE rack, or queſtion, to extort a confeſſion from criminals, is a practice of a different nature: *this* having been only uſed to compel a man to put himſelf upon his trial; *that* being a ſpecies of trial in itſelf. And the trial by rack is utterly unknown to the law of England; though once when the dukes of Exeter and Suffolk, and other miniſters of Henry VI. had laid a deſign to introduce the civil law into this kingdom as the rule of government, for a beginning thereof they erected a rack for torture; which was called in deriſion the duke of Exeter's daughter, and ſtill remains in the tower of London [o]: where it was occaſionally uſed as an engine of ſtate, not of law, more than once in the reign of queen Elizabeth [p]. But when, upon the aſſaſſination of Villiers duke of Buckingham by Felton, it was propoſed in the privy council to put the aſſaſſin to the rack, in order to diſcover his accomplices; the judges, being conſulted, declared una- [326]

[o] 3 Inſt. 35. [p] Barr. 92. 496.

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unquam perveniretur;" for he adds, "*diſſectum eſſe antiquitus neminem equidem neque legi neque audivi.*" lib. 20. c. 1. But with reſpect to the horrid judgment of the *peine forte et dure*, the proſecutor and the court could exerciſe no diſcretion, or ſhew no favour to a priſoner, who ſtood obinately mute. And in the legal hiſtory of this country there are numerous inſtances of perſons, who have had reſolution and patience to undergo ſo terrible a death, in order to benefit their heirs by preventing a forfeiture of their eſtates, which would have been the conſequence of a conviction by a verdict.

There is a memorable ſtory of an anceſtor of an antient family in the north of England. In a fit of jealouſy he killed his wife; and put to death his children who were at home, by throwing them from the battlements of his caſtle: and proceeding with an intent to deſtroy his only remaining child, an infant nurſed at a farm-houſe at ſome diſtance, he was intercepted by a ſtorm of thunder and lightning. This awakened in his breaſt the compunctions of conſcience, he deſiſted from his purpoſe, and having ſurrendered himſelf to juſtice, in order to ſecure his eſtates to this child, he had the reſolution to die under the dreadful judgment of *peine forte et dure*.

nimouſly,

nimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England [q]. It seems astonishing that this usage, of administering the torture, should be said to arise from a tenderness to the lives of men: and yet this is the reason given for it's introduction in the civil law, and it's subsequent adoption by the French and other foreign nations [r]: *viz.* because the laws cannot endure that any man would die upon the evidence of a false, or even a single witness; and therefore contrived this method that innocence should manifest itself by a stout denial, or guilt by a plain confession. Thus rating a man's virtue by the hardiness of his constitution, and his guilt by the sensibility of his nerves!—But there needs only to state accurately [s], in order most effectually to expose this inhuman species of mercy, the uncertainty of which, as a test and criterion of truth, was long ago very elegantly pointed out by Tully; though he lived in a state wherein it was
[327] usual to torture slaves in order to furnish evidence: "*tamen*, says he, "*illa tormenta gubernat dolor, moderatur natura cu-*
"*jusque tum animi tum corporis, regit quaesitor, flectit libido,*
"*corrumpit spes, infirmat metus; ut in tot rerum angustiis*
"*nihil veritati loci relinquatur* [t]."

The English judgment of penance for standing [v] mute was as follows: that the prisoner be remanded to the prison from whence he came; and put into a low, dark chamber; and there be laid on his back, on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more; that he have no sustenance, save only on the first day, three morsels of the worst bread; and, on the second day, three

[q] Rushw. Coll. i. 638.

[r] *Cod. l.* 9. *t.* 41. *l.* 8. & *t.* 47. *l.* 16. Fortesc. *de L.L. Ang. c.* 22.

[s] The marquis Beccaria (ch. 16.) in an exquisite piece of raillery, has proposed this problem, with a gravity and precision that are truly mathematical: "the force of the muscles and the sensibility of the nerves of an innocent "person being given, it is required to "find the degree of pain necessary to "make him confess himself guilty of a "given crime."

[t] *Pro Sulla.* 28.

[v] 2 Hal. P. C. 319. 2 Hawk. P.C. 329.

draughts

draughts of ſtanding water, that ſhould be neareſt to the priſon door; and in this ſituation this ſhould be alternately his daily diet, *till he died*, or (as antiently the judgment ran) *till he anſwered* [u].

IT hath been doubted whether this puniſhment ſubſiſted at the common law [w], or was introduced in conſequence of the ſtatute Weſtm. 1. 3 Edw. I. c. 12. [x] which ſeems to be the better opinion. For not a word of it is mentioned in Glanvil or Bracton, or in any antient author, caſe, or record, (that hath yet been produced,) previous to the reign of Edward I.: but there are inſtances on record in the reign of Henry III. [y], where perſons accuſed of felony, and ſtanding mute, were tried in a particular manner, by two ſucceſſive juries, and convicted; and it is aſſerted by the judges in 8 Hen. IV. that, by the common law before the ſtatute, ſtanding mute on an appeal amounted to a conviction of the felony [z]. This ſtatute of Edward I. directs ſuch perſons "as will not put themſelves upon inqueſts of felonies before [328] "the judges at the ſuit of the king, to be put into hard and "ſtrong priſon *(ſoient mys en la priſone fort et dure)* as thoſe "which refuſe to be at the common law of the land." And, immediately after this ſtatute, the form of the judgment appears in Fleta and Britton to have been only a very ſtrait confinement in priſon, with hardly any degree of ſuſtenance; but no weight is directed to be laid upon the body, ſo as to haſten the death of the miſerable ſufferer: and indeed any ſurcharge of puniſhment on perſons adjudged to penance, ſo as to ſhorten their lives, is reckoned by Horne in the [a] mirror as a ſpecies of criminal homicide. It alſo clearly appears, by a record of 31 Edw. III. [b], that the priſoner might then poſſibly ſubſiſt for forty days under this lingering puniſhment.

[u] Britton. c. 4. & 22. Flet. l. 1. c. 34. § 33.

[w] 2 Inſt. 179. 2 Hal. P. C. 322. 2 Hawk. P. C. 330.

[x] Staundf. P. C. 149. Barr. 82.

[y] Emlyn on 2 Hal. P. C. 322.

[z] *Al common ley, avant le ſtatute de Weſt.* 1. c. 12. *ſi aſcun uſt eſtre appeal, et uſt eſtre mute, ill ſerra convict de felony. (M. 8 Hen. IV. 2.)*

[a] ch. 1. § 9.

[b] 6 Rym. 13.

I ſhould

I ſhould therefore imagine that the practice of loading him with weights, or, as it was uſually called, *preſſing him to death*, was gradually introduced between 31 Edw. III. and 8 Hen. IV. at which laſt period it firſt appears upon our books [c]; being intended as a ſpecies of mercy to the delinquent, by delivering him the ſooner from his torment: and hence I preſume it alſo was, that the duration of the penance was then firſt [d] altered; and inſtead of continuing *till he anſwered*, it was directed to continue *till he died*, which muſt very ſoon happen under an enormous preſſure.

THE uncertainty of it's original, the doubts that were conceived of it's legality, and the repugnance of it's theory (for it rarely was carried into practice) to the humanity of the laws of England, all concurred to require a legiſlative abolition of this cruel proceſs, and a reſtitution of the antient common law; whereby the ſtanding mute in felony, as well as in treaſon and in treſpaſs, amounted to a confeſſion of the charge. Or, if the corruption of the blood and the conſequent eſcheat in felony had been removed, the judgment of *peine forte et dure* might perhaps have ſtill innocently re-
[329] mained, as a monument of the ſavage rapacity with which the lordly tyrants of feodal antiquity hunted after eſcheats and forfeitures; ſince no one would ever have been tempted to undergo ſuch a horrid alternative. For the law was, that by ſtanding mute, and ſuffering this heavy penance, the judgment, and of courſe the corruption of the blood and eſcheat of the *lands*, were ſaved in felony and petit treaſon, though not the forfeiture of the *goods*; and therefore this lingering puniſhment was probably introduced, in order to extort a plea: without which it was held that no judgment of death could be given, and ſo the lord loſt his eſcheat. But in high treaſon, as ſtanding mute is equivalent to a conviction, the ſame judgment, the ſame corruption of blood, and the ſame forfeitures always attended it, as

[c] Yearb. 8 Hen. IV. 1.

[d] *Et fuit dit, que le contraire avoit eſtre fait devant ces heurs.* (*Ibid.* 2.)

in

in other cases of conviction [e]. And very lately, to the honour of our laws, it hath been enacted by statute 12 Geo. III. c. 20. that every person who, being arraigned for felony and piracy, shall stand mute or not answer directly to the offence, shall be convicted of the same; and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded, as if the person had been convicted by verdict or confession of the crime (4). And thus much for the demesnor of a prisoner upon his arraignment, by standing mute; which now, in all cases amounts to a constructive confession.

II. THE other incident to arraignments exclusive of the plea, is the prisoner's actual *confession* of the indictment Upon a simple and plain confession, the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it, and plead to the indictment [f].

BUT there is another species of confession, which we read much of in our antient books, of a far more complicated kind, which is called *approvement*. And that is when a person, indicted of treason or felony, and arraigned for the same, [330]

[e] 2 Hawk. P. C. 331. [f] 2 Hal. P. C. 225.

(4) Two instances have occurred since the passing of this statute, of persons who refused to plead, and who in consequence were condemned and executed. One was at the Old Bailey, for murder, in 1777; the other was for burglary, at the summer assises at Wells, in 1792. It might perhaps have been a greater improvement of the law, if the prisoner's silence had been considered a plea of not guilty, rather than a confession. For it would operate more powerfully as an example, and be more satisfactory to the minds of the public, if the prisoner should suffer death after a public manifestation of his guilt by evidence, than that he should be ordered for execution only from the presumption which arises from his obstinate silence.

doth confeſs the fact before plea pleaded; and appeals or accuſes others, his accomplices in the ſame crime, in order to obtain his pardon. In this caſe he is called an *approver* or prover, *probator*, and the party appealed or accuſed is called the *appellee*. Such approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, ſince the appellee is equally called upon to anſwer it: and if he hath no reaſonable and legal exceptions to make to the perſon of the approver, which indeed are very numerous, he muſt put himſelf upon his trial, either by battel, or by the country; and, if vanquiſhed or found guilty, muſt ſuffer the judgment of the law, and the approver ſhall have his pardon *ex debito juſtitiae*. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver ſhall receive judgment to be hanged, upon his own confeſſion of the indictment; for the condition of his pardon has failed, *viz.* the conviction of ſome other perſon, and therefore his conviction remains abſolute.

BUT it is purely in the diſcretion of the court to permit the approver thus to appeal, or not; and, in fact, this courſe of admitting approvements hath been long diſuſed: for the truth was, as ſir Matthew Hale obſerves, that more miſchief hath ariſen to good men by theſe kind of approvements, upon falſe and malicious accuſations of deſperate villains, than benefit to the public by the diſcovery and conviction of real offenders. And therefore, in the times when ſuch appeals were more frequently admitted, great ſtrictneſs and nicety were held therein [s]: though, ſince their diſcontinuance, the doctrine of approvements is become a matter of more curioſity than uſe. I ſhall only obſerve, that all the good, whatever it be, that can be expected from this method of approvement is fully provided for in the caſes of coining, robbery, burglary, houſe-breaking, horſe-ſtealing, and larciny to the value of five ſhillings from ſhops, warehouſes, ſtables, and coach-houſes, by ſtatutes 4 & 5 W. & M. c. 8.

[s] 2 Hal. P. C. ch. 29. 2 Hawk. P. C. ch. 24.

6 &

6 & 7 W. III. c. 17. 10 & 11 W. III. c. 23. and 5 Ann. c. 31. which enact, that if any such offender, being out of prison, shall discover two or more persons, who have committed the like offences, so as they may be convicted thereof; he shall in case of burglary or housebreaking receive a reward of 40 *l.* and in general be entitled to a pardon of all capital offences, excepting only murder and treason; and of them also in the case of coining [h]. And if any such person, having feloniously stolen any lead, iron, or other metals, shall discover and convict two offenders of having illegally bought or received the same, he shall by virtue of statute 29 Geo. II. c. 30. be pardoned for all such felonies committed before such discovery (5). It hath also been usual for the justices of the peace, by whom any persons charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, king's evidence) against his fellows; upon an implied confidence, which the judges of gaol delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree [i] (6).

[h] The pardon, for discovering offences against the coinage act of 15 Geo. II. c. 28. extends only to all *such* offences.

[i] The King *v.* Rudd; Mich. 16 Geo. III. on a case reserved from the Old Bailey, Oct. 1775.

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(5) The persons described in the above statutes, and also those persons to whom the king, by special proclamation in the gazette or otherwise, has promised his pardon, lord Mansfield says have a right to a pardon. *Cowp.* 334.

(6) In the case of Mrs. Rudd, in which this subject is clearly and ably explained by lord Mansfield, and again by Mr. J. Aston, in delivering the opinion of all the judges, (*Cowp.* 331.) it is laid down that no authority is given to a justice of peace to pardon an offender, and to tell him he shall be a witness at all events against

others. But where the evidence appears insufficient to convict two or more without the testimony of one of them, the magistrate may encourage a hope that he, who will behave fairly and disclose the whole truth and bring the others to justice, shall himself escape punishment. But this discretionary power exercised by the justices of peace is founded in practice only, and cannot controul the authority of the court of gaol delivery, and exempt at all events the accomplice from being prosecuted. A motion is always made to the judge for leave to admit an accomplice to be a witness, and unless he should see some particular reason for a contrary conduct, he will prefer the one to whom this encouragement has been given by the justice of peace. This admission to be a witness amounts to a promise of a recommendation to mercy, upon condition that the accomplice makes a full and fair disclosure of all the circumstances of the crime for which the other prisoners are tried, and in which he has been concerned in concert with them. Upon failure on his part with this condition, he forfeits all claim to protection. And upon a trial some years ago at York, before Mr. J. Buller, the accomplice, who was admitted a witness, denied in his evidence all that he had before confessed, upon which the prisoner was acquitted; but the judge ordered an indictment to be preferred against this accomplice for the same crime, and upon his previous confession, and other circumstances, he was convicted and executed. And if the jury were satisfied with his guilt, there can be no question with regard both to the law and justice of the case.

The learned commentator says, that the accomplice thus admitted a witness, shall not afterwards be prosecuted for that or *any other previous offence of the same degree*. Mrs. Rudd's case does not warrant the extent of that position, for the decision of that case, and what is advanced by Mr. J. Aston, (*Cowp.* 341.) and as the editor conceives the reason and principles of this doctrine, will not extend the claim of the witness to mercy beyond those offences in which he has been connected with the prisoners, and concerning which he has previously undergone an examination. And with regard to these crimes he may be cross-examined by the counsel for the prisoner, but of course he may refuse to criminate himself of other charges, against which that prosecution affords him no protection.

CHAPTER THE TWENTY-SIXTH.

OF PLEA AND ISSUE.

WE are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess, or stand mute. This is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue.

FORMERLY there was another plea, now abrogated, that of *sanctuary*; which is however necessary to be lightly touched upon, as it may give some light to many parts of our antient law: it being introduced and continued during the superstitious veneration that was paid to consecrated ground in the times of popery. First then, it is to be observed, that if a person accused of any crime (except treason, wherein the crown, and sacrilege, wherein the church, was too nearly concerned) had fled to any church or church-yard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and thereupon took the oath in that case provided, *viz.* that he abjured the realm, and would depart from thence forthwith, at the port that should be assigned him, and would never return without leave from the king; he by this means saved his life, if he observed the conditions of the oath, by going with a cross in his hand, and with all convenient speed, to the port assigned, [333] and embarking. For if, during this forty days privilege of sanctuary, or in his road to the sea-side, he was apprehended

and arraigned in any court, for this felony, he might plead the privilege of ſanctuary, and had a right to be remanded, if taken out againſt his will [a]. But by this abjuration his blood was attainted, and he forfeited all his goods and chattels [b]. The immunity of theſe privileged places was very much abridged by the ſtatutes 27 Hen. VIII. c. 19. and 32 Hen. VIII. c. 12. And now, by the ſtatute 21 Jac. I. c. 28. all privilege of ſanctuary, and abjuration conſequent thereupon, is utterly taken away and aboliſhed.

FORMERLY alſo the benefit of clergy uſed to be pleaded before trial or conviction, and was called a *declinatory* plea; which was the name alſo given to that of ſanctuary [c]. But, as the priſoner upon a trial has a chance to be acquitted, and totally diſcharged; and, if convicted of a clergyable felony, is entitled equally to his clergy after as before conviction; this courſe is extremely diſadvantageous: and therefore the benefit of clergy is now very rarely pleaded; but, if found requiſite, is prayed by the convict before judgment is paſſed upon him.

I PROCEED, therefore, to the five ſpecies of pleas, beforementioned.

I. A PLEA to the *juriſdiction*, is where an indictment is taken before a court, that hath no cognizance of the offence; as if a man be indicted for a rape at the ſheriff's tourn, or for treaſon at the quarter ſeſſions: in theſe, or ſimilar caſes, he may except to the juriſdiction of the court, without anſwering at all to the crime alleged [d].

II. A DEMURRER to the indictment. This is incident to criminal caſes, as well as civil, when the fact as alleged is
[334] allowed to be true, but the priſoner joins iſſue upon ſome point of law in the indictment, by which he inſiſts that the fact, as ſtated, is no felony, treaſon, or whatever the crime

[a] Mirr. c. 1. § 13. 2 Hawk. P. C. 335.
[b] 2 Hawk. P. C. 52.
[c] 2 Hal. P. C. 236.
[d] *Ibid.* 256.

is alleged to be. Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound; which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it: in this case the party indicted may demur to the indictment, denying it to be felony, though he confesses the act of taking it. Some have held[e], that if, on demurrer, the point of law be adjudged *against* the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others[f], who hold, that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. Which appears the more reasonable, because it is clear, that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no; and upon the fact thus shewn it appears to be felony; the court will not record the confession, but admit him afterwards to plead not guilty[g]. And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used: since the same advantages may be taken upon a plea of not guilty: or afterwards in arrest of judgment, when the verdict has established the fact.

III. A PLEA in *abatement* is principally for a *misnomer*, a wrong name, or a false addition to the prisoner. As, if *James* Allen, *gentleman*, is indicted by the name of *John* Allen, *esquire*, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And, if either fact is found by a jury, then the indictment shall be abated, as writs or declarations may be [335] in civil actions; of which we spoke at large in the preceding volume[h]. But, in the end, there is little advantage accruing

[e] 2 Hal. P. C. 257.
[f] 2 Hawk. P. C. 334.
[g] 2 Hal. P. C. 225.
[h] See Vol. III. pag. 302.

to the prisoner by means of these dilatory pleas; because if the exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, must at the same time shew how it may be amended. Let us therefore next consider a more substantial kind of plea, *viz.*

IV. SPECIAL pleas in *bar*; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal[i]; but these are applicable to both appeals and indictments.

1. First the plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence[j], he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal is a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the common law[k]: and therefore, in favour of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were past; by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience, the statute 3 Hen. VII. c. 1. enacts, that in-
[336] dictments shall be proceeded on, immediately, at the king's suit, for the death of a man, without waiting for bringing

[i] 2 Hawk. P. C. ch. 23.
[j] 3 Mod. 194.
[k] 2 Hawk. P. C. 373.

an appeal; and the plea, of *autrefoits acquit* on an indictment, shall be no bar to the prosecuting of any appeal.

2. SECONDLY, the plea of *auterfoits convict*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be, (being suspended by the benefit of clergy or other causes,) is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime[l]. Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder; for the fact prosecuted is the same in both, though the offences differ in colouring and in degree. It is to be observed, that the pleas of *auterfoits acquit* and *auterfoits convict*, or a former acquittal, and former conviction, must be upon a prosecution for the same identical act and crime. But the case is otherwise, in

3. THIRDLY, the plea of *auterfoits attaint*, or a former attainder; which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict or confession, by outlawry, or heretofore by abjuration; and whether upon an appeal or an indictment; he may plead such attainder in bar to any subsequent indictment or appeal, for the same or for any other felony[m]. And this because, generally, such proceeding on a second prosecution cannot be to any purpose: for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had: so that it is absurd and superfluous to endeavour to attaint him a second time. But to this general rule, however, as to all others, there are some exceptions; wherein, *cessante ratione, cessat et ipsa lex.* As, 1. Where the former attainder is reversed for error, for then it is the same as if it had never been. And the same reason [337]

[l] 2 Hawk. P. C. 377. [m] *Ibid.* 375.

holds, where the attainder is reverſed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, ſuch attainder is no bar to an appeal: for the prior ſentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the ſuit of the ſubject, by ſuffering the prior ſentence to ſtop the proſecution of a ſecond, and then, when the time of appealing is elapſed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treaſon: becauſe not only the judgment and manner of death are different, but the forfeiture is more extenſive, and the land goes to different perſons. 4. Where a perſon attainted of one felony, is afterwards indicted as principal in another, to which there are alſo acceſſories, proſecuted at the ſame time; in this caſe it is held, that the plea of *auterfoits attaint* is no bar, but he ſhall be compelled to take his trial, for the ſake of public juſtice: becauſe the acceſſories to ſuch ſecond felony cannot be convicted till after the conviction of the principal[n]. And from theſe inſtances we may collect that the plea of *auterfoits attaint* is never good, but when a ſecond trial would be quite ſuperfluous[o].

4. LASTLY, a *pardon* may be pleaded in bar; as at once deſtroying the end and purpoſe of the indictment, by remitting that puniſhment, which the proſecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arreſt of judgment, *before* ſentence is paſt; which gives it by much the preference to pleading it *after* ſentence or attainder. This is, that by ſtopping the judgment it ſtops the attainder, and prevents the corruption of the blood: which, when once corrupted by attainder, cannot afterwards be reſtored, otherwiſe than by act of parliament. But, as the title of pardons is applicable to other ſtages of proſecution; and they have their reſpective force and efficacy, as well after as before conviction, outlawry, or
[338] attainder; I ſhall therefore reſerve the more minute conſi-

[n] Poph. 107. [o] Staund. P. C. 107.

deration

deration of them, till I have gone through every other title except only that of execution.

BEFORE I conclude this head of ſpecial pleas in bar, it will be neceſſary once more to obſerve; that, though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot reſort to another if that be determined againſt him; (as if, on an action of debt, the defendant pleads a general releaſe, and no ſuch releaſe can be proved, he cannot afterwards plead the general iſſue, *nil debet*, as he might at firſt: for he has made his election what plea to abide by, and it was his own folly to chooſe a rotten defence;) though, I ſay, this ſtrictneſs is obſerved in civil actions, *quia intereſt reipublicæ ut ſit finis litium:* yet in criminal proſecutions *in favorem vitae*, as well upon appeal as indictment, when a priſoner's plea in bar is found againſt him upon iſſue tried by a jury, or adjudged againſt him in point of law by the court; ſtill he ſhall not be concluded or convicted thereon, but ſhall have judgment of *reſpondeat ouſter*, and may plead over to the felony the general iſſue, not guilty[p]. For the law allows many pleas, by which a priſoner may eſcape death; but only one plea, in conſequence whereof it can be inflicted; *viz.* on the general iſſue, after an impartial examination and deciſion of the fact, by the unanimous verdict of a jury. It remains therefore that I conſider,

V. THE general iſſue, or plea of *not guilty*[q], upon which plea alone the priſoner can receive his final judgment of death. In caſe of an indictment of felony or treaſon, there can be no ſpecial juſtification put in by way of plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defence againſt a robber on the highway, or a burglar; but he muſt plead the general iſſue, not guilty, and give this ſpecial matter in evidence. For (beſides that theſe pleas do in effect amount to the general iſſue; ſince, if true, the priſoner is moſt clearly not guilty) as the facts in treaſon are laid to be done *proditorie et contra ligeantiae ſuae debitum*, [339]

[p] 2 Hal. P. C. 239. [q] See Append. § 1.

and,

and, in felony, that the killing was done *felonice;* theſe charges, of a traiterous or felonious intent, are the points and very *giſt* of the indictment, and muſt be anſwered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defenſive matter, and give their verdict accordingly as effectually as if it were, or could be, ſpecially pleaded. So that this is, upon all accounts, the moſt advantageous plea for the priſoner[r].

WHEN the priſoner hath thus pleaded not guilty, *non culpabilis*, or *nient culpable;* which was formerly uſed to be abbreviated upon the minutes, thus, "*non* (or *nient*) *cul.*" the clerk of the aſſiſe, or clerk of the arraigns, on behalf of the crown, replies, that the priſoner is guilty, and that he is ready to prove him ſo. This is done by two monoſyllables in the ſame ſpirit of abbreviation, "*cul. prit.*" which ſignifies firſt that the priſoner is guilty, (*cul. culpable*, or *culpabilis*,) and then that the king is ready to prove him ſo; *prît*, *praeſto ſum*, or *paratus verificare*. This is therefore a replication on behalf of the king *viva voce* at the bar; which was formerly the courſe in all pleadings, as well in civil as in criminal cauſes. And that was done in the conciſeſt manner: for when the pleader intended to demur, he expreſſed his demurrer in a ſingle word, "*judgment;*" ſignified that he demanded judgment whether the writ, declaration, plea, &c. either in form or matter, were ſufficiently good in law: and if he meant to reſt on the truth of the facts pleaded, he expreſſed that alſo in a ſingle ſyllable, "*prît;*" ſignifying that he was ready to prove his aſſertions: as may be obſerved from the year-books and other antient repoſitories of law[s]. By this replication the king and the priſoner are therefore at iſſue: for we may remember, in our ſtrictures upon pleadings in the preceding book[t], it was obſerved, that when the parties come to a fact, which is affirmed on one ſide and denied on the other, then they are ſaid to be at iſſue in point of
[340] fact: which is evidently the caſe here, in the plea of *non*

r 2 Hal. P. C. 258.

s North's life of lord Guildford. 98.

t See Vol. III. pag. 312.

cul.

cul. by the prisoner; and the replication of *cul.* by the clerk. And we may also remember, that the usual conclusion of all affirmative pleadings, as this of *cul.* or *guilty* is, was by an averment in these words, "and this he is *ready* to verify; *et* "*hoc paratus est verificare:*" which same thing is here expressed by the single word "*prit.*"

How our courts came to express a matter of this importance in so odd and obscure a manner, "*rem tantam tam* "*negligenter,*" can hardly be pronounced with certainty. It may perhaps, however, be accounted for by supposing, that these were at first short notes, to help the memory of the clerk, and remind him what he was to reply; or else it was the short method of taking down in court, upon the minutes, the replication and averment; "*cul. prit:*" which afterwards the ignorance of succeeding clerks adopted for the very words to be by them spoken[u].

But however it may have arisen, the joining of issue (which though now usually entered on the record[w], is no otherwise joined[x] in any part of the proceedings,) seems to be clearly the meaning of this obscure expression[y]; which has puzzled our most ingenious etymologists, and is commonly understood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner, by asking him, "*culprit,* how wilt thou be tried?" for immediately upon issue joined it is inquired of the prisoner, by what trial he will make his innocence appear(1). This form

[u] Of this ignorance we may see daily instances, in the use of two legal terms of antient French, one, the prologue to all proclamations, "*oyez,*" or hear ye, which is generally pronounced most unmeaningly, "O yes:" the other, a more pardonable mistake, *viz.* when a jury are all sworn, the officer bids the crier number them, for which the word in law-french is, "*countez;*" but we now hear it pronounced in very good English, "count these."

[w] See Appendix, § 1.

[x] 2 Hawk. P. C. 399.

[y] 2 Hal. P. C. 258.

(1) The learned judge's explanation of *prit* from *praesto sum,* or *paratus verificare,* however ingenious, is certainly inconsistent both with the principles and practice of special pleading. After the general

has at present reference to appeals and approvements only wherein the appellee has his choice, either to try the accusa-
[341] tion by battel or by jury. But upon indictments, since the abolition of ordeal, there can be no other trial but by jury, *per pais*, or by the country: and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, that is, to answer that he will be tried by God and the country[z], if a commoner; and, if a peer, by God and his peers[a],

[z] A learned author, who is very seldom mistaken in his conjectures, has observed that the proper answer is, "*by God* "or *the country*," that is, either by *ordeal* or by *jury*; because the question supposes an option in the prisoner. And certainly it gives some countenance to this observation, that the trial by *ordeal* used formerly to be called *judicium Dei*. But it should seem, that when the question gives the prisoner an option, his answer must be positive; and not in the disjunctive, which returns the option back to the prosecutor.

[a] Keylinge 57. State Trials, *passim*.

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neral issue, or the plea of not guilty, there could be no replication; or the words *paratus verificare* could not possibly have been used. This plea in Latin was entered thus upon the record: *Non inde est culpabilis, et pro bono et malo ponit se super patriam;* after this the attorney-general, the king's coroner, or clerk of assizes could only join issue by *facit similiter*, or *he doth the like*. (See App. p. 3. at the end of this book.) If then I might be allowed to indulge a conjecture of my own, I should think that *prit* was an easy corruption of *pnt.* written for *ponit*, by the clerk, as a minute that issue was joined, or *ponit se super patriam;* or *pnt se* might be converted into *prist* or *prest*, as it is sometimes written. *Cul* was probably intended to denote the plea, and *prit* the issue; and these syllables being pronounced aloud by the clerk to give the court and prisoner an opportunity of hearing the accuracy of the minute, and being immediately followed by the question, How wilt thou be tried? naturally induced the ignorant part of the audience to suppose that *cul prit* was an appellation given to the prisoner. As a confirmation of the conjecture that *prit* is a corruption for *pnt.*, the clerk of arraigns at this day, immediately after the arraignment, writes upon the indictment over the name of the prisoner, *puts*. And Roger North informs us, that in antient times, when pleadings in the courts were *ore tenus*, "if a serjeant in the common "pleas said *judgment*, that was a demurrer; if *prist*, that was an "issue to the country." *Life of Lord Keeper North*, 98.

the

the indictment, if in treason, is taken *pro confesso*: and the prisoner, in cases of felony, is adjudged to stand mute; and, if he perseveres in his obstinacy, shall now[b] be convicted of the felony.

WHEN the prisoner has thus put himself upon his trial, the clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, "God send thee a good deliverance." And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.

[b] Stat. 12 Geo. III. c. 20.

CHAPTER THE TWENTY-SEVENTH.

OF TRIAL AND CONVICTION.

THE ſeveral methods of trial and conviction of offenders eſtabliſhed by the laws of England, were formerly more numerous than at preſent, through the ſuperſtition of our Saxon anceſtors: who, like other northern nations, were extremely addicted to divination: a character, which Tacitus obſerves of the antient Germans [a]. They therefore invented a conſiderable number of methods of purgation or trial, to preſerve innocence from the danger of falſe witneſſes, and in conſequence of a notion that God would always interpoſe miraculouſly, to vindicate the guiltleſs.

I. THE moſt antient [b] ſpecies of trial was that by *ordeal*; which was peculiarly diſtinguiſhed by the appellation of *judicium Dei*; and ſometimes *vulgaris purgatio*, to diſtinguiſh it from the canonical purgation, which was by the oath of the party. This was of two ſorts [c], either *fire*-ordeal, or *water*-ordeal; the former being confined to perſons of higher rank, the latter to the common people [d]. Both theſe might be per-
[343] formed by deputy: but the principal was to anſwer for the ſucceſs of the trial; the deputy only venturing ſome cor-

[a] *de mor. Germ.* 10.

[b] *LL. Inae*, c. 77.

[c] Mirr. c. 3. § 23.

[d] *Tenetur ſe purgare is qui accuſatur, per Dei judicium; ſcilicet per calidum ferrum, vel per aquam, pro diverſitate conditionis hominum: per ferrum calidum ſi fuerit homo liber; per aquam, ſi fuerit ruſticus.* (Glanv. *l.* 14. c. 1.)

poral

poral pain, for hire, or perhaps for friendſhip [e]. Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two, or three pounds weight; or elſe by walking, barefoot, and blindfold, over nine red-hot plowſhares, laid lengthwiſe at unequal diſtances: and if the party eſcaped being hurt, he was adjudged innocent; but if it happened otherwiſe, as without colluſion it uſually did, he was then condemned as guilty. However, by this latter method queen Emma, the mother of Edward the confeſſor, is mentioned to have cleared her character, when ſuſpected of familiarity with Alwyn biſhop of Wincheſter [f].

WATER-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and eſcaping unhurt thereby: or by caſting the perſon ſuſpected into a river or pond of cold water; and, if he floated therein without any action of ſwimming, it was deemed an evidence of his guilt; but, if he ſunk, he was acquitted. It is eaſy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity ſtill practiſed in many countries to diſcover witches, by caſting them into a pool of water, and drowning them to prove their innocence. And in the eaſtern empire the fire-ordeal was uſed to the ſame purpoſe by the emperor Theodore Laſcaris; who, attributing his ſickneſs to magic, cauſed all thoſe whom he ſuſpected to handle the hot iron: thus joining (as had been well remarked [g]) to the moſt dubious crime in the world, the moſt dubious proof of innocence.

AND indeed this purgation by ordeal ſeems to have been very antient, and very univerſal, in the times of ſuperſtitious barbarity. It was known to the antient Greeks: for in the Antigone of Sophocles [h], a perſon, ſuſpected by Creon of a [344] miſdemeſnor, declares himſelf ready "to handle hot iron, "and to walk over fire," in order to manifeſt his innocence;

[e] This is ſtill expreſſed in that common form of ſpeech, "of going "through fire and water to ſerve an-"other."

[f] Tho. Rudborne *Hiſt. maj. Winton.* l. 4. c. 1.

[g] Sp. L. b. 12. c. 5.

[h] v. 270.

which,

which, the ſcholiaſt tells us, was then a very uſual purgation. And Grotius [i] gives us many inſtances of water-ordeal in Bithynia, Sardinia, and other places. There is alſo a very peculiar ſpecies of water-ordeal, ſaid to prevail among the Indians on the coaſt of Malabar; where a perſon accuſed of any enormous crime is obliged to ſwim over a large river abounding with crocodiles, and if he eſcapes unhurt, he is reputed innocent. As, in Siam, beſides the uſual methods of fire and water-ordeal, both parties are ſometimes expoſed to the fury of a tyger let looſe for that purpoſe: and, if the beaſt ſpares either, that perſon is accounted innocent; if neither, both are held to be guilty; but if he ſpares both, the trial is incomplete, and they proceed to a more certain criterion [k].

ONE cannot but be aſtoniſhed at the folly and impiety of pronouncing a man guilty, unleſs he was cleared by a miracle; and of expecting that all the powers of nature ſhould be ſuſpended, by an immediate interpoſition of providence to ſave the innocent, whenever it was preſumptuouſly required. And yet in England, ſo late as king John's time, we find grants to the biſhops and clergy to uſe the *judicium ferri, aquae, et ignis* [l]. And, both in England and Sweden, the clergy preſided at this trial, and it was only performed in the churches or in other conſecrated ground; for which Stiernhook [m] gives the reaſon; "*non deſuit illis operae et* "*laboris pretium; ſemper enim ab ejuſmodi judicio aliquid lucri* "*ſacerdotibus obveniebat.*" But, to give it it's due praiſe, we find the canon law very early declaring againſt trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "*cum ſit contra praeceptum Domini, non tentabis Dominum* "*Deum tuum* [n]." Upon this authority, though the canons
[345] themſelves were of no validity in England, it was thought proper (as had been done in Denmark above a century before [o]) to diſuſe and aboliſh this trial entirely in our courts

[i] On Numb. v. 17.
[k] Mod. Univ. Hiſt. vii. 266.
[l] Spelm. *Gloſſ.* 435.
[m] *de jure Sueonum, l.* 1. *c.* 8.
[n] *Decret. part.* 2. *cauſ.* 2. *qu.* 5. *diſt.* 7. *Decretal. lib.* 3. *tit.* 50. *c.* 9. & *Gloſſ. ibid.*
[o] Mod. Un. Hiſt. xxxii. 105.

of

of juſtice, by an act of parliament in 3 Henry III. according to ſir Edward Coke [p], or rather by an order of the king in council [q].

II. ANOTHER ſpecies of purgation, ſomewhat ſimilar to the former, but probably ſprung from a preſumptuous abuſe of revelation in the ages of dark ſuperſtition, was the *corſned* or morſel of execration: being a piece of cheeſe or bread, of about an ounce in weight, which was conſecrated with a form of exorciſm; deſiring of the Almighty that it might cauſe convulſions and paleneſs, and find no paſſage, if the man was really guilty; but might turn to health and nouriſhment, if he was innocent [r]: as the water of jealouſy among the Jews [s] was, by God's ſpecial appointment, to cauſe the belly to ſwell, and the thigh to rot, if the woman was guilty of adultery. This corſned was then given to the ſuſpected perſon, who at the ſame time alſo received the holy ſacrament [t]: if indeed the corſned was not, as ſome have ſuſpected, the ſacramental bread itſelf; till the ſubſequent invention of tranſubſtantiation preſerved it from profane uſes with a more profound reſpect than formerly. Our hiſtorians aſſure us, that Godwin, earl of Kent, in the reign of king Edward the confeſſor, abjuring the death of the king's brother, at laſt appealed to his corſned, "*per buccellam deglutien-*"*dam abjuravit* [u]," which ſtuck in his throat and killed him. This cuſtom has long ſince been gradually aboliſhed, though the remembrance of it ſtill ſubſiſts in certain phraſes of abjuration retained among the common people [w].

HOWEVER we cannot but remark, that though in Euro- [346] pean countries this cuſtom moſt probably aroſe from an abuſe of revealed religion, yet credulity and ſuperſtition will, in

[p] 9 Rep. 32.

[q] 1 Rym. *Foed.* 228. Spelm. *Gloſſ.* 326. 2 Pryn. Rec. Append. 20. Seld. *Eadm. fol.* 48.

[r] Spelm. *Gl.* 439.

[s] Numb. ch. 5.

[t] *LL. Canut. c.* 6.

[u] Ingulph.

[w] As, "I will take the ſacrament "upon it; may this morſel be my laſt;" and the like.

all ages and in all climates, produce the ſame or ſimilar effects. And therefore we ſhall not be ſurprized to find, that in the kingdom of Pegu there ſtill ſubſiſts a trial by the corſned, very ſimilar to that of our anceſtors, only ſubſtituting raw rice inſtead of bread [x]. And, in the kingdom of Monomotapa, they have a method of deciding lawſuits equally whimſical and uncertain. The witneſs for the plaintiff chews the bark of a tree, endued with an emetic quality; which, being ſufficiently maſticated, is then infuſed in water, which is given the defendant to drink. If his ſtomach rejects it, he is condemned: if it ſtays with him he is abſolved, unleſs the plaintiff will drink ſome of the ſame water; and, if it ſtays with him alſo, the ſuit is left undetermined [y].

THESE two antiquated methods of trial were principally in uſe among our Saxon anceſtors. The next, which ſtill remains in force, though very rarely in uſe, owes it's introduction among us to the princes of the Norman line. And that is

III. THE trial by *battel*, duel, or ſingle combat; which was another ſpecies of preſumptuous appeals to providence, under an expectation that heaven would unqueſtionably give the victory to the innocent or injured party. The nature of this trial in caſes of civil injury, upon iſſue joined in a writ of right, was fully diſcuſſed in the preceding book [z]: to which I have only to add, that the trial by battel may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal ſolemnity as that on a writ of right: but with this difference, that there each party might hire a champion, but here they muſt fight in their proper perſons. And therefore if the appel-
[347] lant or approver be a woman, a prieſt, an infant, or of the age of ſixty, or lame or blind, he or ſhe may counterplead and refuſe the wager of battel; and compel the appellee to put

[x] Mod. Univ. Hiſt. vii. 129.
[y] *Ibid.* xv. 464.
[z] See Vol. III. pag. 337.

himſelf

himself upon the country. Also peers of the realm, bringing an appeal, shall not be challenged to wage battel, on account of the dignity of their persons; nor the citizens of London, by special charter, because fighting seems foreign to their education and employment. So likewise if the crime be notorious; as if the thief be taken with the *mainour*, or the murderer in the room with a bloody knife, the appellant may refuse the tender of battel from the appellee [a]; for it is unreasonable that an innocent man should stake his life against one who is already half-convicted.

THE form and manner of waging battel upon appeals are much the same as upon a writ of right; only the oaths of the two combatants are vastly more striking and solemn [b]. The appellee, when appealed of felony, pleads *not guilty*, and throws down his glove, and declares he will defend the same by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagonist, swears to this effect. "*Hoc audi, homo, quem per manum* "*teneo, &c.* Hear this, O man, whom I hold by the "hand, who callest thyself John by the name of baptism, "that I, who call myself Thomas by the name of baptism, "did not feloniously murder thy father, William by name, "nor am any way guilty of the said felony. So help me "God, and the saints; and this I will defend against thee "by my body, as this court shall award." To which the appellant replies, holding the bible and his antagonist's hand in the same manner as the other: "Hear this, O man, whom "I hold by the hand, who callest thyself Thomas by the "name of baptism, that thou art perjured; and therefore "perjured, because that thou feloniously didst murder my "father, William by name. So help me God and the saints; [348] "and this I will prove against thee by my body, as this

[a] 2 Hawk. P. C. 427. [b] Flet. l. 1. c. 34. 2 Hawk. P. C. 426.

"court ſhall award[c]." The battel is then to be fought with the ſame weapons, *viz.* batons, the ſame ſolemnity, and the ſame oath againſt amulets and ſorcery, that are uſed in the civil combat: and if the appellee be ſo far vanquiſhed, that he cannot or will not fight any longer, he ſhall be adjudged to be hanged immediately; and then, as well as if he be killed in battel, providence is deemed to have determined in favour of the truth, and his blood ſhall be attainted. But if he kills the appellant, or can maintain the fight from ſunriſing till the ſtars appear in the evening, he ſhall be acquitted. So alſo if the appellant becomes recreant, and pronounces the horrible word of *craven*, he ſhall loſe his *liberam legem*, and become infamous; and the appellee ſhall recover his damages, and alſo be for ever quit, not only of the appeal, but of all indictments likewiſe for the ſame offence (1).

IV. THE fourth method of trial uſed in criminal caſes is that by the peers of Great Britain, in the court of parliament, or the court of the lord high ſteward, when a peer is capitally *indicted*: for in caſe of an *appeal*, a peer ſhall be

[c] There is a ſtriking reſemblance between this proceſs and that of the court of *Areopagus* at Athens for murder; wherein the proſecutor and priſoner were both ſworn in the moſt ſolemn manner: the proſecutor, that he was related to the deceaſed, (for none but near relations were permitted to proſecute in that court,) and that the priſoner was the cauſe of his death; the priſoner, that he was innocent of the charge againſt him. (Pott. Antiq. b. 1. c. 19.)

(1) The laſt time that the trial by battel was awarded in this country, was in the caſe of lord Rea and Mr. Ramſey, in the 7 Ch. I. The king by his commiſſion appointed a conſtable of England to preſide at the trial, who appointed a day for the duel, on which the combatants were to appear with a ſpear, a long ſword, a ſhort ſword, and a dagger; but the combat was prorogued to a further day, before which the king revoked the commiſſion. See an account of the proceedings, 11 *Harg. St. Tr.* 124.

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tried by jury [d] (2). Of this enough has been said in a former chapter [e]; to which I shall only now add, that in the method and regulation of it's proceedings, it differs little from the trial *per patriam*, or by jury; except that no special verdict can be given in the trial of a peer [f]; because the lords of parliament, or the lord high steward (if the trial be had in his court) are judges sufficiently competent of the law that may arise from the fact: and except also that the peers [349] need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude, and bind the minority [g].

V. The trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter [h]: "*nullus liber homo capiatur, vel imprisonetur, aut* "*exulet, aut aliquo alio modo destruatur, nisi per legale judicium* "*parium suorum, vel per legem terrae.*"

The antiquity and excellence of this trial, for the settling of civil property, has before been explained at large [i]. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and

[d] 9 Rep. 30. 2 Inst. 49.
[e] See pag 259.
[f] Hatt. 116.
[g] Kelynge. 56. stat. 7 W. III. c. 3. § 11. Foster. 247.
[h] 9 Hen. III. c. 29.
[i] See Vol. III. pag. 379.

(2) The nobility are tried by their peers for treason and felony, and misprision of these; but in all other criminal prosecutions they are tried like commoners by a jury. 3 *Inst.* 30. See 1 vol. 401. n. 7.

the prerogative of the crown. It was neceſſary, for preſerving the admirable balance of our conſtitution, to veſt the executive power of the laws in the prince: and yet this power might be dangerous and deſtructive to that very conſtitution, if exerted without check or control, by juſtices of *oyer* and *terminer* occaſionally named by the crown; who might then, as in France or Turkey, impriſon, diſpatch, or exile any man that was obnoxious to the government, by an inſtant declaration, that ſuch is their will and pleaſure. But the founders of the Engliſh law have with excellent forecaſt contrived, that no man ſhould be called to anſwer to the king for any capital crime, unleſs upon the preparatory accuſation of twelve or more of his fellow-ſubjects, the grand jury: and that the truth of every accuſation, whether pre-
[350] ferred in the ſhape of indictment, information, or appeal, ſhould afterwards be confirmed by the unanimous ſuffrage of twelve of his equals and neighbours, indifferently choſen, and ſuperior to all ſuſpicion. So that the liberties of England cannot but ſubſiſt, ſo long as this *palladium* remains ſacred and inviolate; not only from all open attacks, (which none will be ſo hardy as to make,) but alſo from all ſecret machinations, which may ſap and undermine it; by introducing new and arbitrary methods of trial, by juſtices of the peace, commiſſioners of the revenue, and courts of conſcience. And however *convenient* theſe may appear at firſt, (as doubtleſs all arbitrary powers, well executed, are the moſt *convenient*,) yet let it be again remembered, that delays, and little inconveniences in the forms of juſtice, are the price that all free nations muſt pay for their liberty in more ſubſtantial matters; that theſe inroads upon this ſacred bulwark of the nation are fundamentally oppoſite to the ſpirit of our conſtitution; and that, though begun in trifles, the precedent may gradually increaſe and ſpread, to the utter diſuſe of juries in queſtions of the moſt momentous concern.

WHAT was ſaid of juries in general, and the trial thereby, in *civil* caſes, will greatly ſhorten our preſent remarks, with regard to the trial of *criminal* ſuits; indictments, informations,

tions, and appeals; which trial I shall consider in the same method that I did the former; by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

WHEN therefore a prisoner on his arraignment has pleaded *not guilty*, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto*; that is freeholders (3), without just exception, and of the *visne* or neighbourhood; which is interpreted to be of the county where the fact is committed [j]. If the proceedings are before the court of king's bench, there is time allowed, between the arraignment and the trial, for a jury to be impanelled by a writ of *venire facias* to the sheriff, as in civil causes: [351] and the trial in case of a misdemesnor is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar; which is always invariably had when the prisoner is tried for any capital offence (4). But, before commissioners of *oyer* and *terminer* and gaol delivery, the sheriff, by virtue of a general precept directed to him before-hand, returns to the court a panel of forty-eight jurors, to try all felons that may be called upon their trial at that session: and therefore it is there usual to try all felons immediately, or soon, after their arraignment. But it is not customary, nor agreeable to the general course of proceedings, (unless by consent of parties, or where the defendant is actually in gaol,) to try persons indicted of smaller misdemesnors at the same court in which they have pleaded *not guilty*, or *traversed* the indictment. But they usually give security to the court, to appear at the next

j 2 Hal. P. C. 264. 2 Hawk. P. C. 403.

(3) Since the 4 & 5 *W. & M. c.* 24. which admits copyholders upon juries, it is not necessary that the jurors should be freeholders in criminal cases, except in treason, and there it is expressly required by the bill of rights. 1 *W. & M. st.* 2. *c.* 2.

(4) See how indictments for capital offences may be tried at *nisi prius*, p. 309. n. 3. *ante*.

assises or session, and then and there to try the traverse, giving notice to the prosecutor of the same (5).

IN cases of high treason, whereby corruption of blood may ensue, (except treason in counterfeiting the king's coin or seals,) or misprision of such treason, it is enacted by statute 7 W. III. c. 3. first, that no person shall be tried for any such treason, except an attempt to assassinate the king, unless the indictment be found within three years after the offence committed: next, that the prisoner shall have a copy of the indictment, (which includes the caption [k],) but not the names of the witnesses, five days at least before the trial; that is, upon the true construction of the act, before his arraignment [l]; for then is his time to take any exceptions thereto, by way of plea or demurrer: thirdly, that he shall also have a copy of the panel or jurors two days before his trial: and, lastly, that he shall have the same compulsive process to bring in his witnesses *for* him, as was usual to compel their appearance *against* him. And, by statute 7 Ann. c. 21, (which did not take place till after the decease of the late pretender), all persons, indicted for high treason or misprision
[352] thereof, shall have not only a copy of the indictment, but a list of all the witnesses to be produced, and of the jurors impanelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses; the better to prepare him to make his challenges and defence. But this last act, so far as it affected indictments for the inferior species of high treason, respecting the coin and the royal seals, is repealed by the statute 6 Geo. III. c. 53. else it had been impossible to have tried those of-

[k] Foft. 229. Append. i. [l] *Ibid.* 230.

(5) Every defendant indicted for a misdemesnor should give full eight days notice of trial to the prosecutor, before the assizes, if the trial is to be there; if at the sessions, it is usual to give two or three days notice. *Cr. Circ. Comp.* 17. 48. Or the justices at sessions fix as a general rule what time they think a reasonable notice in such cases.

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fences in the same circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time usually allotted for any session of *oyer* and *terminer* [m] (6). And no person indicted for felony is, or (as the law stands) ever can be, entitled to such copies, before the time of his trial [n].

WHEN the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.

CHALLENGES may here be made, either on the part of the king, or on that of the prisoner; and either to the whole array, or to the separate polls, for the very same reasons that they may be made in civil causes [o]. For it is here at least as necessary, as there, that the sheriff or returning officer be totally indifferent; that where an alien is indicted, the jury should be *de medietate*, or half foreigners, if so many are found in the place; (which does not indeed hold in treasons [p], aliens being very improper judges of the breach of allegiance; nor yet in the case of Egyptians under the statute 22 Hen. VIII. c. 10.) that on every panel there should be a competent number of hundredors; and that the particular jurors should

[m] Post 250.
[n] 2 Hawk. P. C. 410.
[o] See Vol. III. pag. 359.
[p] 2 Hawk. P. C. 420. 2 Hal. P. C. 271.

(6) It is the practice to deliver the copy of the indictment, and the lists of witnesses and jurors, ten clear days, exclusive of the day of delivery and the day of trial, and of intervening Sundays previous to the trial. *Post.* 2. 250.

By the 39 & 40 *Geo.* III. *c.* 93. it is enacted, that in all cases of high treason, in compassing or imagining the death of the king, or in misprision of such treason, where the overt act of such treason shall be alleged in the indictment to be the assassination of the king, or a direct attempt against his life or person, the person accused shall be indicted and tried in the same manner in every respect and upon the like evidence, as if he was charged with murder. But the judgment and execution shall remain the same as in other cases of high treason.

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be *omni exceptione majores;* not liable to objection either *propter honoris respectum, propter defectum, propter affectum,* or *propter delictum.*

[353] CHALLENGES upon any of the foregoing accounts are ſtiled challenges *for cauſe;* which may be without ſtint in both criminal and civil trials. But in criminal caſes, or at leaſt in capital ones, there is, *in favorem vitae,* allowed to the priſoner an arbitrary and capricious ſpecies of challenge to a certain number of jurors, without ſhewing any cauſe at all; which is called a *peremptory* challenge: a proviſion full of that tenderneſs and humanity to priſoners, for which our Engliſh laws are juſtly famous (7). This is grounded on two reaſons. 1. As every one muſt be ſenſible, what ſudden impreſſions and unaccountable prejudices we are apt to conceive upon the bare looks and geſtures of another; and how neceſſary it is, that a priſoner (when put to defend his life) ſhould have a good opinion of his jury, the want of which might totally diſconcert him; the law wills not that he ſhould be tried by any one man againſt whom he has conceived a prejudice, even without being able to aſſign a reaſon for ſuch his diſlike. 2. Becauſe, upon challenges for cauſe ſhewn, if the reaſon aſſigned prove inſufficient to ſet aſide the juror, perhaps the bare queſtioning his indifference may ſometimes provoke a reſentment; to prevent all ill conſequences from which, the priſoner is ſtill at liberty, if he pleaſes, peremptorily to ſet him aſide.

THIS privilege, of peremptory challenges, though granted to the priſoner, is denied to the king by the ſtatute 33 Edward I. ſt. 4. which enacts, that the king ſhall challenge no jurors without aſſigning a cauſe certain, to be tried and approved by the court. However it is held, that the king need not aſſign his cauſe of challenge, till all the panel is gone

(7) A peremptory challenge is not allowed in the trial of collateral iſſues. *Foſt.* 42. Nor in any trial for a miſdemeſnor. 2 *Harg. St. Tr.* 808. and 4 *H. St. Tr.* 1.

through,

through, and unleſs there cannot be a full jury without the perſons ſo challenged. And then, and not ſooner, the king's counſel muſt ſhew the cauſe: otherwiſe the juror ſhall be ſworn [q] (8).

THE peremptory challenges of the priſoner muſt however have ſome reaſonable boundary; otherwiſe he might never be tried. This reaſonable boundary is ſettled by the common [354] law to be the number of thirty-five: that is, one under the number of three full juries. For the law judges that five and thirty are fully ſufficient to allow the moſt timorous man to challenge through mere caprice; and that he who peremptorily challenges a great number, or three full juries, has no intention to be tried at all. And therefore it dealt with one, who peremptorily challenges above thirty-five, and will not retract his challenge, as with one who ſtands mute or refuſes his trial; by ſentencing him to the *peine forte et dure* in felony, and by attainting him in treaſon [r]. And ſo the law ſtands at this day with regard to treaſon of any kind.

BUT by ſtatute 22 Hen. VIII. c. 14. (which, with regard to felonies, ſtands unrepealed by ſtatute 1 & 2 Ph. & Mar. c. 10.) by this ſtatute, I ſay, no perſon arraigned for felony, can be admitted to make any more than *twenty* peremptory challenges. But how if the priſoner will peremptorily challenge twenty-one, what ſhall be done? The old opinion

[q] 2 Hawk. P. C. 413. 2 Hal. P. C. 271.
[r] 2 Hal. P. C. 268.

(8) And the practice is the ſame both in trials for miſdemeſnors and for capital offences. 3 *Harg. St. Tr.* 519. Where there is a challenge for cauſe, two perſons in court not of the jury are ſworn to try whether the juryman challenged will try the priſoner indifferently. Evidence is then produced to ſupport the challenge, and according to the verdict of the two tryers, the juryman is admitted or rejected. A juryman was thus ſet aſide in O'Coigly's trial for treaſon, becauſe upon looking at the priſoners, he had uttered the words, "damned raſcals." See O'Coigly's trial.

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was, that judgment of *piene forte et dure* ſhould be given, as where he challenged thirty-ſix at the common law[s]; but the better opinion ſeems to be[t], that ſuch challenge ſhall only be diſregarded and over-ruled. Becauſe, firſt, the common law doth not inflict the judgment of penance for challenging twenty-one, neither doth the ſtatute inflict it; and ſo heavy a judgment (or that of conviction which ſucceeds it) ſhall not be impoſed by implication. Secondly, the words of the ſtatute are, "that he be not *admitted* to challenge more "than twenty;" the evident conſtruction of which is, that any farther challenge ſhall be diſallowed or prevented: and therefore, being null from the beginning, and never in fact a challenge, it can ſubject the priſoner to no puniſhment; but the juror ſhall be regularly ſworn.

IF, by reaſon of challenges or the default of the jurors, a ſufficient number cannot be had of the original panel, a *tales* may be awarded as in civil cauſes[u], till the number of twelve is ſworn, "well and truly to try, and true deliverance make, "between our ſovereign lord the king, and the priſoner "whom they have in charge; and a true verdict to give, "according to their evidence."

[355]

WHEN the jury is ſworn, if it be a cauſe of any conſequence, the indictment is uſually opened, and the evidence marſhalled, examined, and enforced by the counſel for the crown, or proſecution. But it is a ſettled rule at common law, that no counſel ſhall be allowed a priſoner upon his trial, upon the general iſſue, in any capital crime, unleſs ſome point of law ſhall ariſe proper to be debated[w]. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly underſtood, that the judge ſhall be counſel for the priſoner; that is, ſhall ſee that the proceedings againſt him are legal and ſtrictly regular[x]) ſeems

[s] 2 Hawk. P. C. 414.

[t] 3 Inſt. 227. 2 Hal. P. C. 270.

[u] See Vol. III. pag. 364. But, in mere commiſſions of gaol delivery, no *tales* can be awarded; though the court may *ore tenus* order a new panel to be returned *inſtanter*. (4 Inſt. 68. 4 St. Tr. 728. Cooke's Caſe.)

[w] 2 Hawk. P. C. 400.

[x] Sir Edward Coke (3 Inſt. 137.)

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to be not at all of a piece with the reſt of the humane treatment of priſoners by the Engliſh law. For upon what face of reaſon can that aſſiſtance be denied to ſave the life of a man, which yet is allowed him in proſecutions for every petty treſpaſs? Nor indeed is it ſtrictly ſpeaking a part of our antient law: for the mirrour [y], having obſerved the neceſſity of counſel in civil ſuits, "who know how to forward and defend "the cauſe, by the rules of law and cuſtoms of the realm," immediately afterwards ſubjoins; "and more neceſſary are "they for defence upon indictments and appeals of felony, "than upon other venial cauſes [z]." (8) And the judges them-

gives another additional reaſon for this refuſal, "becauſe the evidence to con-"vict a priſoner ſhould be ſo manifeſt, as "it could not be contradicted." Which lord Nottingham (when high ſteward) declared (3 St. Tr. 726.) was the only good reaſon that could be given for it.

[y] c. 3. § 1.

[z] Father Parſons the jeſuit, and after him biſhop Ellys (of Engliſh liberty, ii. 26.), have imagined, that the benefit of counſel to plead for them was firſt denied to priſoners by a law of Hen. I. meaning (I preſume) chapter 47 and 48 of the code which is uſually attributed to that prince. "*De cauſis criminalibus* "*vel capitalibus nemo quaerat conſilium*; "*quin implacitatus ſtatim perneget, ſine* "*omni petitione conſilii.—In aliis omnibus* "*poteſt et debet uti conſilio.*"—But this *conſilium*, I conceive, ſignifies only an *imparlance*, and the *petitio conſilii* is *craving leave to imparl*; (See Vol. III. pag. 298.) which is not allowable in any criminal proſecution. This will be manifeſt by comparing this law with a contemporary paſſage in the *grand couſtumier* of Normandy, (ch 85.) which ſpeaks of imparlances in perſonal actions. "*Apres ce, eſt tenu le querelle a* "*reſpondre*; *et aura congie de ſoy con-*"*ſeillier, s'il le demande: et quand il* "*ſera conſeille il peut nyer le faict dont* "*il eſt accuſe.*" Or, as it ſtands in the Lat. text, (*edit.* 1539.) "*Querelatus* "*autem poſtea tenetur reſpondere*; *et ha-*"*bebit licentiam conſulendi, ſi requirat*; "*habito autem conſilio, debet factum ne-*"*gare quo accuſatus eſt.*"

(8) The priſoner is not allowed counſel to plead his cauſe before the jury in any felony, whether it is capital, within the benefit of clergy, or a caſe of petty larceny. But in miſdemeanours the priſoner or defendant is allowed counſel as in civil actions.

The maxim that the judge is counſel for the priſoner ſignifies nothing more than that the judge ſhall take care that the priſoner does not ſuffer from the want of counſel.

The judge is counſel only for public juſtice, and to promote that object alone all his enquiries and attention ought to be directed. Upon a trial for the murder of a *male* child, the counſel for the proſecution concluded his caſe without aſking the ſex of the

ſelves are ſo ſenſible of this defect, that they never ſcruple to allow a priſoner counſel to inſtruct him what queſtions to
[356] aſk, or even to aſk queſtions for him, with reſpect to matters of fact: for as to matters of law, ariſing on the trial, they are *entitled* to the aſſiſtance of counſel. But, leſt this indulgence ſhould be intercepted by ſuperior influence, in the caſe of ſtate-criminals, the legiſlature has directed by ſtatute 7 W. III. c. 3. that perſons *indicted* for ſuch high treaſon, as works a corruption of the blood, or miſpriſion thereof, (except treaſon in counterfeiting the king's coin or ſeals,) may make their full defence by counſel, not exceeding two, to be named by the priſoner and aſſigned by the court or judge; and the ſame indulgence, by ſtatute 20 Geo. II. c. 30. is extended to parliamentary *impeachments* for high treaſon, which were excepted in the former act (9).

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the child, and the judge would not permit him afterwards to call a witneſs to prove it, but, in conſequence of the omiſſion, he directed the jury to acquit the priſoner. But to the honour of that judge, it ought to be ſtated, that he declared afterwards in private his regret for his conduct. This caſe is well remembered, but it ought never to be cited but with reprobation.

(9) Upon the trial of iſſues which do not turn upon the queſtion of guilty or not guilty, but upon collateral facts, priſoners under a capital charge, whether for treaſon or felony, always were entitled to the full aſſiſtance of counſel. *Foſt.* 232. 42. It is very extraordinary that the law of England ſhould have denied the aſſiſtance of counſel, when it is wanted moſt, *viz.* to defend the life, the honour, and all the property of an individual. It is the extenſion of that maxim of natural equity, that every one ſhall be heard in his own cauſe, that warrants the admiſſion of hired advocates in courts of juſtice; for there is much greater inequality in the powers of explanation and perſuaſion in the natural ſtate of the human mind, than when it is improved by education and experience. Amongſt profeſſional men of eſtabliſhed character, the difference in their ſkill and management is generally ſo inconſiderable, that the deciſion of the cauſe depends only upon the ſuperiority of the juſtice in the reſpective caſes of the litigating parties. Hence the practice of an advocate is abſolutely neceſſary to the adminiſtration of ſubſtantial juſtice. An honourable barriſter will

THE doctrine of evidence upon pleas of the crown is, in moſt reſpects, the ſame as that upon civil actions. There are however a few leading points, wherein, by ſeveral ſtatutes, and reſolutions, a difference is made between civil and criminal evidence.

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will never miſ-ſtate either law or facts within his own knowledge, but he is juſtified in urging any argument, whatever may be his own opinion of the ſolidity or juſtneſs of it, which he may think will promote the intereſts of his client; for reaſoning in courts of juſtice and in the ordinary affairs of life ſeldom admits of geometrical demonſtration; but it happens not unfrequently that the ſame argument, which appears ſophiſtry to one, is found logic in the mind of another, and every day's experience proves that the opinions of a judge and an advocate are often diametrically oppoſite. Many circumſtances may occur, which will juſtify or compel an individual member of the profeſſion to refuſe the defence of a particular client, but a cauſe can hardly be conceived which ought to be rejected by all the bar; for ſuch a conduct in the profeſſion would excite ſo ſtrong a prejudice againſt the party, as to render him in a great degree condemned before his trial. Let the circumſtances againſt a priſoner be ever ſo atrocious, it is ſtill the duty of the advocate to ſee that his client is convicted according to thoſe rules and forms, which the wiſdom of the legiſlature has eſtabliſhed as the beſt protection of the liberty and the ſecurity of the ſubject. But the conduct of counſel in the proſecution of criminals, ought to be very different from that which is required from them in civil actions, or when they are engaged on the ſide of a priſoner; in the latter caſes they are the advocates of their client only, and ſpeak but by his inſtruction and permiſſion; in the former they are the advocates of public juſtice, or to ſpeak more profeſſionally, they are the advocates of the king, who, in all criminal proſecutions, is the repreſentative of the people, and both the king and the country muſt be better ſatisfied with the acquittal of the innocent, than with the conviction of the guilty. Hence in all criminal proſecutions, eſpecially where the priſoner can have no counſel to plead for him, a barriſter is as much bound to diſcloſe all thoſe circumſtances to the jury, and to reaſon upon them as fully, which are favourable to the priſoner, as thoſe, which are likely to ſupport the proſecution.

FIRST,

FIRST, in all cases of high treason, petit treason, and misprision of treason, by statutes 1 Edw. VI. c. 12. and 5 & 6 Edw. VI. c. 11. *two* lawful witnesses are required to convict a prisoner; unless he shall willingly and without violence *confess* the same. By statute 1 and 2 Ph. & Mar. c. 10. a farther exception is made as to treasons in counterfeiting the king's seals or signatures, and treasons concerning coin current within this realm; and more particularly by c. 11. the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The statutes 8 & 9 W. III. c. 25. and 15
[357] & 16 Geo. II. c. 28. in their subsequent extensions of this species of treason do also provide, that the offenders may be indicted, arraigned, tried, convicted, and attainted, by the like evidence, and in such manner and form, as may be had and used against offenders for counterfeiting the king's money. But by statute 7 W. III. c. 3. in prosecutions for those treasons to which that act extends, the same rule (of requiring *two* witnesses) is again enforced; with this addition, that the *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court*. In the construction of which act it hath been holden[a], that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. But hasty unguarded confessions, made to persons having no such authority, ought not to be admitted as evidence under this statute. And indeed, even in cases of felony at the common law, they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence. By the same statute 7 W. III. it is declared that both witnesses must be to the same overt act of treason, or one to one overt act, and the other to another overt act, of the same species of treason[b], and not of distinct heads or kinds: and

[a] Foster, 240—244. [b] See St. Tr. II. 144. Foster, 235.

no

no evidence shall be admitted to prove any overt act not expressly laid in the indictment. And therefore in sir John Fenwick's case, in king William's time, where there was but one witness, an act of parliament[c] was made on purpose to attaint him of treason, and he was executed[d]. But in almost every other accusation one positive witness is sufficient. Baron Montesquieu lays it down for a rule[e], that those laws which condemn a man to death *in any case* on the deposition of a single witness, are fatal to liberty: and he adds this reason, that the witness who affirms, and the accused who denies, make an equal balance[f]; there is a necessity therefore to call in a third man to incline the scale. But this seems to be [358] carrying matters too far: for there are some crimes, in which the very privacy of their nature excludes the possibility of having more than one witness; must these therefore escape unpunished? Neither indeed is the bare denial of the person accused equivalent to the positive oath of a disinterested witness. In cases of indictments for perjury, this doctrine is better founded; and there our law adopts it: for one witness is not allowed to convict a man indicted for perjury; because then there is only one oath against another[g]. In cases of treason also there is the accused's oath of allegiance, to counterpoise the information of a single witness; and that may perhaps be one reason why the law requires a double testimony to convict him: though the principal reason, undoubtedly, is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages.

SECONDLY, though from the reversal of colonel Sidney's attainder by act of parliament in 1689[h] it may be collected[i], that the mere similitude of hand-writing in two papers shewn to a jury, without other concurrent testimony, is no evidence that both were written by the same person; yet undoubtedly

[c] Stat. 8 W. III. c. 4.
[d] St. Tr. V. 40.
[e] Sp. L. b. 12. c. 3.
[f] Beccar. c. 13.
[g] 10 Mod. 194.
[h] St. Tr. VIII. 472.
[i] 2 Hawk. P. C. 431.

the teſtimony of witneſſes, well acquainted with the party's hand, that they believe the paper in queſtion to have been written by him, is evidence to be left to a jury [j] (10.)

THIRDLY, by the ſtatute 21 Jac. I. c. 27. a mother of a baſtard child, concealing it's death, muſt prove by one witneſs that the child was born dead; otherwiſe ſuch concealment ſhall be evidence of her having murdered it [k].

FOURTHLY, all preſumptive evidence of felony ſhould be admitted cautiouſly: for the law holds, that it is better that ten guilty perſons eſcape, than that one innocent ſuffer. [359] And ſir Matthew Hale in particular [l] lays down two rules moſt prudent and neceſſary to be obſerved: 1. Never to convict a man for ſtealing the goods of a perſon unknown, merely becauſe he will give no account how he came by them, unleſs an actual felony be proved of ſuch goods: and, 2. Never to convict any perſon of murder or manſlaughter, till at leaſt the body be found dead; on account of two inſtances he mentions, where perſons were executed for the murder of others, who were then alive, but miſſing.

LASTLY, it was an antient and commonly received practice [m], (derived from the civil law, and which alſo to this day obtains in the kingdom of France [n],) that, as counſel was not allowed to any priſoner accuſed of a capital crime, ſo neither ſhould he be ſuffered to exculpate himſelf by the teſtimony of any witneſſes. And therefore it deſerves to be re-

[j] Lord Preſton's caſe. *A. D.* 1690. St. Tr. IV. 453. Francia's caſe, *A. D.* 1716. St. Tr. VI. 69. Layer's caſe, *A. D.* 1722. *Ibid.* 279. Henzey's caſe, *A. D.* 1758. 4 Burr. 644.

[k] See pag. 198.

[l] 2 Hal. P. C. 290.

[m] St. Tr. I. *paſſim.*

[n] Domat. publ. law. b. 3. t. 1. Monteſq. Sp. L. b. 29. c. 11.

(10) But the proof of hand-writing is not evidence in high treaſon, unleſs the papers are found in the cuſtody of the priſoner. 1 *Burr.* 644.

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membered to the honour of Mary I. (whose early sentiments, till her marriage with Philip of Spain, seem to have been humane and generous[o],) that when she appointed sir Richard Morgan chief justice of the common pleas, she injoined him, "that notwithstanding the old error, which "did not admit any witness to speak, or any other matter "to be heard, in favour of the adversary, her majesty being "party; her highness's pleasure was, that whatsoever could "be brought in favour of the subject should be admitted to "be heard: and moreover, that the justices should not per-"suade themselves to sit in judgment otherwise for her high-"ness than for her subject[p]." Afterwards, in one particular instance (when embezzling the queen's military stores was made felony by statute 31 Eliz. c. 4.) it was provided that any person impeached for such felony, "should be received "and admitted to make any lawful proof that he could, by "lawful witness or otherwise, for his discharge and defence:" and in general the courts grew so heartily ashamed of a doctrine so unreasonable and oppressive, that a practice was gradually introduced of examining witnesses for the prisoner, but not upon oath[q]: the consequence of which still was, that [360] the jury gave less credit to the prisoner's evidence, than to that produced by the crown. Sir Edward Coke[r] protests very strongly against this tyrannical practice: declaring that he never read in any act of parliament, book-case, or record, that in criminal cases the party accused should not have witnesses sworn for him; and therefore there was not so much as *scintilla juris* against it[s]. And the house of commons were so sensible of this absurdity, that, in the bill for abolishing hostilities between England and Scotland[t], when felonies committed by Englishmen in Scotland were ordered to be tried in one of the three northern counties, they insisted on a clause, and carried it[u] against the efforts of both the crown and the house of lords, against the practice of the courts in

[o] See pag. 17.
[p] Hollingsh. 1112. St. Tr. I. 72.
[q] 2 Bulst. 147. Cro. Car. 292.
[r] 3 Inst. 79.
[s] See also 2 Hal. P. C. 283. and his summary, 264.
[t] Stat. 4 Jac. I. c. 1.
[u] Com. Journ. 4. 5. 12, 13. 15. 29. 30. Jun. 1607.

England, and the expreſs law of Scotland[w], "that in all "ſuch trials for the better diſcovery of the truth, and the "better information of the conſciences of the jury and juſ-"tices, there ſhall be allowed to the party arraigned the be-"nefit of ſuch credible witneſſes, to be examined upon oath "as can be produced for his clearing and juſtification." At length by the ſtatute 7 W. III. c. 3. the ſame meaſure of juſtice was eſtabliſhed throughout all the realm, in caſes of treaſon within the act: and it was afterwards declared by ſtatute 1 Ann. ſt. 2. c. 9. that in all caſes of treaſon and felony, all witneſſes *for* the priſoner ſhould be examined upon oath, in like manner as the witneſſes *againſt* him.

WHEN the evidence on both ſides is cloſed, and indeed when any evidence hath been given, the jury cannot be diſcharged (unleſs in caſes of evident neceſſity[x]) till they have given in their verdict (11); but are to conſider of it, and deliver it in, with the ſame forms, as upon civil cauſes: only they cannot, in a criminal caſe which touches life or member, give a *privy* verdict[y]. But the judges may adjourn, while the jury are withdrawn to confer, and re-
[361] turn to receive the verdict in open court[z]. And ſuch public or open verdict may be either general, guilty, or not guilty; or ſpecial, ſetting forth all the circumſtances of the caſe, and praying the judgment of the court, whether, for inſtance, on the facts ſtated, it be murder, manſlaughter, or no crime at all. This is where they *doubt* the matter of law, and therefore *chuſe* to leave it to the determination of the court;

[w] *Ibid.* 4 Jun. 1607.
[x] Co. Litt. 227. 3 Inſt. 110. Foſt. 27. Gould's caſe, Hil. 1764.
[y] 2 Hal. P. C. 300. 2 Hawk. P. C. 439.
[z] 3 St. Tr. 731. 4 St. Tr. 237. 455. 485.

(11) It is now ſettled that when a criminal trial runs to ſuch a length, as it cannot be concluded in one day, the court by it's own authority may adjourn till the next morning; but the jury muſt be ſomewhere kept together, that they may have no communication but with each other. *Stone's caſe*, 6 *T. R.* 527.

though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths; and, if their verdict be notoriously wrong, they may be punished, and the verdict set aside by attaint at the suit of the king; but not at the suit of the prisoner [y]. But the practice, heretofore in use, of fining, imprisoning, or otherwise punishing jurors, merely at the discretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconstitutional, and illegal; and is treated as such by sir Thomas Smith, two hundred years ago; who accounted "such doings to be very violent, tyrannical, and contrary to "the liberty and custom of the realm of England [z]." For, as sir Matthew Hale well observes [a], it would be a most unhappy case for the judge himself, if the prisoner's fate depended upon his directions:—unhappy also for the prisoner; for, if the judge's opinion must rule the verdict, the trial by jury would be useless. Yet in many instances [b], where contrary to evidence the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a new trial granted by the court of king's bench: for in such case, as hath been said, it cannot be set right by attaint. But there hath yet been no instance of granting a new trial, where the prisoner was *acquitted* upon the first [c].

If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation [d]; except he be appealed of felony within the time limited by law. And upon such his acquittal, or discharge for want of prosecution, he shall be immediately set at large, without payment of any fee to the gaoler [e]. But if the jury find him guilty [f], [362]

[y] 2 Hal. P. C. 310.

[z] Smith's commonw. l. 3. c. 1.

[a] 2 Hal. P. C. 313.

[b] 1 Lev. 9. T. Jones, 163. St. Tr. X. 416.

[c] 2 Hawk. P. C. 442.

[d] The civil law in such case only discharges him from the same accuser, but not from the same accusation. (*Ff.* 48. 2. 7. § 2.)

[e] Stat. 14 Geo. III. c. 20.

[f] In the Roman republic, when the prisoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was something peculiarly delicate: not that he was guilty, but that he had not been enough upon his guard; "*parum cavisse visus est.*" (*Festus*, 325.)

he is then said to be *convicted* of the crime whereof he stands indicted. Which conviction may accrue two ways; either by his confessing the offence and pleading guilty; or by his being found so by the verdict of his country.

WHEN the offender is thus convicted, there are two collateral circumstances that immediately arise. 1. On a conviction, (or even upon an acquittal where there was a reasonable ground to prosecute, and in fact a *bona fide* prosecution,) for any grand or petit larciny or other felony, the reasonable expences of prosecution, and also, if the prosecutor be poor, a compensation for his trouble and loss of time, are by statutes 25 Geo. II. c. 36. and 18 Geo. III. c. 19. to be allowed him out of the county stock, if he petitions the judge for that purpose: and by statute 27 Geo. II. c. 3. explained by the same statute 18 Geo. III. c. 19. all persons appearing upon recognizance or *subpœna* to give evidence, whether any indictment be preferred or no, and as well without conviction as with it, are entitled to be paid their charges, with a farther allowance (if poor) for their trouble and loss of time (12). 2. On a conviction of larciny in particular, the prosecutor shall have restitution of his goods, by virtue of the statute 21 Hen. VIII. c. 11. For by the common law there was no restitution of goods upon an indictment, because it is at the suit of the king only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again [g]. But, it being considered that the party, prosecuting the offender by indictment, deserves to the full as much encouragement as he who prosecutes by appeal, this statute was made, which enacts, that if any person be convicted of larciny by the evidence of the party robbed, he shall have full restitution of his money, goods, and chattels; or the value

[g] 3 Inst. 242.

(12) But the costs cannot be allowed the prosecutor out of the county rates in any case for a misdemeanor. 7 *T. R.* 377.

of them out of the offender's goods, if he has any, by a writ to be granted by the juſtices. And the conſtruction of this act having been in great meaſure conformable to the law of appeals, it has therefore in practice ſuperſeded the uſe of appeals of larciny. For inſtance: as formerly upon appeals [h], ſo now upon indictments of larciny, this writ of reſtitution ſhall reach the goods ſo ſtolen, notwithſtanding the property [i] of them is endeavoured to be altered by ſale in market overt [k]. And though this may ſeem ſomewhat hard upon the buyer, yet the rule of law is that "*ſpoliatus debet, ante omnia, reſtitui;*" eſpecially when he has uſed all the diligence in his power to convict the felon. And, ſince the caſe is reduced to this hard neceſſity, that either the owner or the buyer muſt ſuffer; the law prefers the right of the owner, who has done a meritorious act by purſuing a felon to condign puniſhment, to the right of the buyer, whoſe merit is only negative, that he has been guilty of no unfair tranſaction. And it is now uſual for the court, upon the conviction of a felon, to order (without any writ) immediate reſtitution of ſuch goods, as are brought into court, to be made to the ſeveral proſecutors. Or, elſe, ſecondly, without ſuch writ of reſtitution, the party may peaceably retake his goods, wherever he happens to find them [l], unleſs a new property be fairly acquired therein. Or, laſtly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover againſt him for his goods; and recover a ſatisfaction in damages. But ſuch action lies not before proſecution; for ſo felonies would be made up and healed [m]: and alſo recaption is unlawful, if it be done with intention to ſmother or compound the larciny; it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter [n] (13).

It is not uncommon, when a perſon is convicted of a miſdemeſnor, which principally and more immediately affects

h Bracton, *de coron. c.* 32.
i See Vol. II. pag. 450.
k 1 Hal. P. C. 543.
l See Vol. III. pag. 4.
m 1 Hal. P. C. 546.
n See pag. 133.

(13) The owner of goods ſtolen, who has proſecuted the thief to conviction, cannot recover the value of his goods from a perſon

some individual, as a battery, imprisonment, or the like, for the court to permit the defendant to *speak with the prosecutor*
[364] before any judgment is pronounced; and, if the prosecutor declares himself satisfied, to inflict but a trivial punishment. This is done to reimburse the prosecutor his expenses, and make him some private amends, without the trouble and circuity of a civil action. But it surely is a dangerous practice: and, though it may be intrusted to the prudence and discretion of the judges in the superior courts of record, it ought never to be allowed in local or inferior jurisdictions, such as the quarter-sessions; where prosecutions for assaults are by this means too frequently commenced, rather for private lucre than for the great ends of public justice. Above all it should never be suffered, where the testimony of the prosecutor himself is necessary to convict the defendant: for by this means, the rules of evidence are entirely subverted; the prosecutor becomes in effect a plaintiff, and yet is suffered to bear witness for himself. Nay even a voluntary forgiveness, by the party injured, ought not in true policy to intercept the stroke of justice. "This," says an elegant writer[o], (who pleads with equal strength for the *certainty* as for the *lenity* of punishment,) "may be an act of good nature and humanity, but "it is contrary to the good of the public. For, although a "private citizen may dispense with satisfaction for his private "injury, he cannot remove the necessity of public example. "The right of punishing belongs not to any one individual "in particular, but to the society in general, or the sove-"reign who represents that society: and a man may re-"nounce his own portion of this right, but he cannot give "up that of others."

[o] Beec. ch. 46.

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who has purchased them and sold them again, even with notice of the theft, before conviction. 2 *T. R.* 750.

And if the owner of goods loses them by a fraud and not by a felony, and afterwards convicts the offender, he is not entitled to restitution, or to retain them, against a person, as a pawnbroker, who has fairly acquired a new right of property in them. 5 *T. R.* 175.

CHAPTER THE TWENTY-EIGHTH.

OF THE BENEFIT OF CLERGY.

AFTER trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance; of which the principal is the *benefit of clergy*: a title of no small curiosity as well as use; and concerning which I shall therefore inquire: 1. Into it's original, and the various mutations which this privilege of clergy has sustained. 2. To what persons it is to be allowed at this day; 3. In what cases. 4. The consequences of allowing it.

I. CLERGY, the *privilegium clericale*, or in common speech *the benefit of clergy*, had it's original from the pious regard paid by christian princes to the church in it's infant state; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church, were principally of two kinds: 1. Exemption of *places*, consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries: 2. Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale*.

BUT the clergy, increasing in wealth, power, honour, number, and interest, began soon to set up for themselves: and that which they obtained by the favour of the civil government, they now claimed as their inherent right: and as a right

right of the higheſt nature, indefeaſable, and *jure divina* [a]. By their canons therefore and conſtitutions they endeavoured at, and where they met with eaſy princes obtained, a vaſt extenſion of theſe exemptions: as well in regard to the crimes themſelves, of which the liſt became quite univerſal [b]; as in regard to the perſons exempted, among whom were at length comprehended not only every little ſubordinate officer belonging to the church or clergy, but even many that were totally laymen.

IN England however, although the uſurpations of the pope were very many and grievous, till Henry the eighth entirely exterminated his ſupremacy, yet a total exemption of the clergy from ſecular juriſdiction could never be thoroughly effected, though often endeavoured by the clergy [c]: and therefore, though the antient *privilegium clericale* was in *ſome* capital caſes, yet it was not *univerſally*, allowed. And in thoſe particular caſes, the uſe was for the biſhop or ordinary to demand his clerks to be remitted out of the king's courts, as ſoon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty [d]: till at length it was finally ſettled in the reign of Henry the ſixth, that the priſoner ſhould firſt be arraigned; and might either *then* claim his benefit of clergy, by way of declinatory plea; or, *after conviction*, by way of arreſting judgment. This latter way is moſt uſually practiſed, as it is more to the ſatisfaction of the court to have the crime previouſly aſcertained by confeſſion or the verdict of a jury; and alſo it is more advantageous to the priſoner himſelf, who may poſſibly be acquitted, and ſo need not the benefit of his clergy at all.

ORIGINALLY the law was held, that no man ſhould be admitted to the privilege of clergy, but ſuch as had the *habi-*
[367] *tum et tonſuram clericalem* [e]. But in proceſs of time a much

[a] The principal argument, upon which they founded this exemption, was that text of ſcripture; "touch not "mine anointed, and do my prophets "no harm." Keilw. 181.)

[b] See Vol. III. pag. 62.

[c] Keilw. 180.

[d] 2 Hal. P. C. 377.

[e] 2 Hal. P. C. 372. M. Paris, *A. D.* 1259. See Vol. I. pag. 24.

wider

wider and more comprehenſive criterion was eſtabliſhed: every one that could read (a mark of great learning in thoſe days of ignorance and her ſiſter ſuperſtition) being accounted a clerk or *clericus*, and allowed the benefit of clerkſhip, though neither initiated in holy orders, nor trimmed with the clerical tonſure. But when learning, by means of the invention of printing, and other concurrent cauſes, began to be more generally diſſeminated than formerly; and reading was no longer a competent proof of clerkſhip, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*: and therefore by ſtatute 4 Henry VII. c. 13. a diſtinction was once more drawn between mere lay ſcholars, and clerks that were really in orders. And, though it was thought reaſonable ſtill to mitigate the ſeverity of the law with regard to the former, yet they were not put upon the ſame footing with actual clergy; being ſubjected to a ſlight degree of puniſhment, and not allowed to claim the clerical privilege more than once. Accordingly the ſtatute directs, that no perſon, once admitted to the benefit of clergy, ſhall be admitted thereto a ſecond time, unleſs he produces his orders: and in order to diſtinguiſh their perſons, all laymen who are allowed this privilege ſhall be burnt with a hot iron in the brawn of the left thumb. This diſtinction between learned laymen, and real clerks in orders, was aboliſhed for a time by the ſtatutes 28 Hen. VIII. c. 1. and 32 Hen. VIII. c. 3. but it is held [f] to have been virtually reſtored by ſtatute 1 Edw. VI. c. 12. which ſtatute alſo enacts that lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the firſt offence, (although they cannot read, and without being burnt in the hand,) for all offences then clergyable to commoners, and alſo for the crimes of houſe-breaking, highway-robbery, horſe-ſtealing, and robbing of churches (1).

[f] Hob. 294. 2 Hal. P. C. 375.

(1) Upon the conviction of the ducheſs of Kingſton for bigamy, it was argued by the Attorney-general Thurlow, that peereſſes were

AFTER this burning the laity, and before it the real clergy, were discharged from the sentence of the law in the king's courts, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formally to work to make a purgation of the offender by a new canonical trial; although he had been previously convicted by his country, or perhaps by his own confession [f]. This trial was held before the bishop in person, or his deputy; and by a jury of twelve clerks: and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then, witnesses were to be examined upon oath, but on behalf of the prisoner only: and, lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner; otherwise, if a clerk, he was degraded, or put to penance [g]. A learned judge, in the beginning of the last century [h], remarks with much indignation the vast complication

[f] Staundford, P. C. 138. *b.*
[g] 3 P. Wm. 447. Hob. 289.
[h] Hob. 291.

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were not entitled by 1 Edw. VI. c. 12. like peers, to the privilege of peerage; but it was the unanimous opinion of the judges, that a peeress convicted of a clergyable felony ought to be immediately discharged without being burnt in the hand, or without being liable to any imprisonment. 11 *H. St. Tr.* 264. If the duchess had been admitted, like a commoner, only to the benefit of clergy, burning in the hand at that time could not have been dispensed with.

The argument was, that the privilege of peerage was only an extension of the benefit of clergy, and therefore granted only to those who were or might be entitled to that benefit; but as no female, peeress or commoner, at that time was entitled to the benefit of clergy, so it was not the intention of the legislature to grant to any female the privilege of peerage.

And in my opinion the argument of the attorney-general is much more convincing and satisfactory, as a legal demonstration, than the arguments of the counsel on the other side, or the reasons stated for the opinions of the judges.

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of perjury and ſubornation of perjury, in this ſolemn farce of a mock trial; the witneſſes, the compurgators, and the jury, being all of them partakers in the guilt: the delinquent party alſo, though convicted before on the cleareſt evidence, and conſcious of his own offence, yet was permitted and almoſt compelled to ſwear himſelf not guilty: nor was the good biſhop himſelf, under whoſe countenance this ſcene of wickedneſs was daily tranſacted, by any means exempt from a ſhare of it. And yet by this purgation the party was reſtored to his credit, his liberty, his lands, and his capacity of purchaſing afreſh, and was entirely made a new and an innocent man.

THIS ſcandalous proſtitution of oaths, and the forms of juſtice, in the almoſt conſtant acquittal of felonious clerks by purgation, was the occaſion, that, upon very heinous and notorious circumſtances of guilt, the temporal courts would [369] not truſt the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *abſque purgatione facienda*: in which ſituation the clerk convict could not make purgation; but was to continue in priſon during life, and was incapable of acquiring any perſonal property, or receiving the profits of his lands, unleſs the king ſhould pleaſe to pardon him. Both theſe courſes were in ſome degree exceptionable; the latter being perhaps too rigid, as the former was productive of the moſt abandoned perjury. As therefore theſe mock trials took their riſe from factious and popiſh tenets, tending to exempt one part of the nation from the general municipal law; it became high time, when the reformation was thoroughly eſtabliſhed, to aboliſh ſo vain and impious a ceremony.

ACCORDINGLY the ſtatute 18 Eliz. c. 7. enacts, that, for the avoiding of ſuch perjuries and abuſes, after the offender has been allowed his clergy, he ſhall not be delivered to the ordinary, as formerly; but, upon ſuch allowance and burning in the hand, he ſhall forthwith be enlarged and delivered out of priſon; with proviſo, that the judge may, if he thinks fit,

fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued, for above a century, unaltered; except only that the ſtatute 21 Jac. I. c. 6. allowed, that women convicted of ſimple larcinies under the value of ten ſhillings ſhould (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, and whipped, ſtocked, or impriſoned for any time not exceeding a year. And a ſimilar indulgence, by the ſtatutes 3 & 4 W. & M. c. 9. and 4 & 5 W. & M. c. 24. was extended to women, guilty of any clergyable felony whatſoever; who were allowed once to claim the benefit of the *ſtatute*, in like manner as men might claim the benefit of *clergy*, and to be diſcharged upon being burned in the hand, and impriſoned for any time not exceeding a year. The puniſhment of burning in the *hand* being found ineffectual, was alſo changed by ſtatute 10 and 11 W. III. c. 23.
[370] into burning in the moſt viſible part of the left *cheek*, neareſt the noſe: but, ſuch an indelible ſtigma being found by experience to render offenders deſperate, this proviſion was repealed about ſeven years afterwards, by ſtatute 5 Ann. c. 6. and, till that period, all women, all peers of parliament and peereſſes, and all male commoners who could read, were diſcharged in all clergyable felonies; the males abſolutely, if clerks in orders; and other commoners, both male and female, upon branding, and peers and peereſſes without branding, for the firſt offence: yet all liable (excepting peers and peereſſes) if the judge ſaw occaſion, to impriſonment not exceeding a year. And thoſe men, who could not read, if under the degree of peerage, were hanged.

AFTERWARDS indeed it was conſidered, that education and learning were no extenuations of guilt, but quite the reverſe: and that, if the puniſhment of death for ſimple felony was too ſevere for thoſe who had been liberally inſtructed, it was, *a fortiori*, too ſevere for the ignorant alſo. And thereupon by the ſame ſtatute 5 Ann. c. 6. it was enacted, that the benefit of clergy ſhould be granted to all thoſe who were entitled to aſk it, without requiring them to read by way of conditional

conditional merit (2). 'And experience having ſhewn, that ſo very univerſal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital puniſhments were too rigorous for theſe inferior offences, yet no puniſhment at all (or next to none) was as much too gentle; it was farther enacted by the ſame ſtatute, that when any perſon is convicted of any theft or larciny, and burnt in the hand for the ſame according to the ancient law, he ſhall alſo, at the diſcretion of the judge, be committed to the houſe of correction or publick workhouſe, to be there kept to hard labour, for any time not leſs than ſix months, and not exceeding two years; with a power of inflicting a double confinement in caſe of the party's eſcape from the firſt. And it was alſo enacted by the ſtatutes 4 Geo. I. c. 11. and 6 Geo. I. c. 23. that when any perſons ſhall be convicted of any larciny, either grand or petit, or any felonious ſtealing or taking of money or goods and chattels either [371] from the perſon or the houſe of any other, or in any other manner, and who by the law ſhall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court in their diſcretion, inſtead of ſuch burning in the hand or whipping, may direct ſuch offenders to be tranſported to America, (or, by ſtatute 19 Geo. III. c. 74. to any other parts beyond the ſeas) for ſeven years: and if they return or are ſeen at large in this kingdom within that time, it ſhall be felony without benefit of clergy. And by the ſubſequent ſtatutes 16 Geo. II. c. 15. and

(2) The ſtatute enacts, that if a perſon convicted of a clergyable offence *ſhall pray the benefit of this act*, he ſhall not be required to read, but ſhall be taken to be, and puniſhed as, a clerk convict. Hence perſons convicted of manſlaughters, bigamies, and ſimple grand larcinies, *&c.* are ſtill aſked what they have to ſay why judgment of death ſhould not be pronounced upon them? And they are then told to kneel down, and pray the benefit of the ſtatute. It would perhaps have been more conſiſtent with the dignity of a court of juſtice to have granted the benefit of clergy, without requiring an unneceſſary form, the meaning of which very few comprehend.

8 Geo. III. c. 15. many wiſe proviſions are made for the more ſpeedy and effectual execution of the laws relating to tranſportation, and the conviction of ſuch as tranſgreſs them. But now, by the ſtatute 19 Geo. III. c. 74. all offenders liable to tranſportation may in lieu thereof, at the diſcretion of the judges, be employed, if males (except in the caſe of petty larceny) in hard labour for the benefit of ſome public navigation; or, whether males or females, may, in all caſes be confined to hard labour in certain penitentiary houſes, to be erected by virtue of the ſaid act, for the ſeveral terms therein ſpecified, but in no caſe exceeding ſeven years; with a power of ſubſequent mitigation, and even of reward, in caſe of their good behaviour. But if they eſcape and are re-taken, for the firſt time an addition of three years is made to the term of their confinement; and a ſecond eſcape is felony without benefit of clergy.

IN forming the plan of theſe penitentiary houſes, the principal objects have been, by ſobriety, cleanlineſs, and medical aſſiſtance, by a regular ſeries of labour, by ſolitary confinement during the intervals of work, and by due religious inſtruction, to preſerve and amend the health of the unhappy offenders, to inure them to habits of induſtry, to guard them from pernicious company, to accuſtom them to ſerious reflection, and to teach them both the principles and practice of every chriſtian and moral duty. And if the whole of this plan be properly executed, and it's defects be timely ſup-
[372] plied, there is reaſon to hope that ſuch a reformation may be effected in the lower claſſes of mankind, and ſuch a gradual ſcale of puniſhment be affixed to all gradations of guilt, as may in time ſuperſede the neceſſity of capital puniſhment, except for very atrocious crimes.

IT is alſo enacted by the ſame ſtatute, 19 Geo. III. c. 74. that inſtead of burning in the hand (which was ſometimes too ſlight and ſometimes too diſgraceful a puniſhment) the court in all clergyable felonies may impoſe a pecuniary fine;

or

or (except in the case of manslaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; such private whipping (to prevent collusion or abuse) to be inflicted in the presence of two witnesses, and in case of female offenders in the presence of females only. Which fine or whipping shall have the same consequences as burning in the hand; and the offender, so fined or whipped, shall be equally liable to a subsequent detainer or imprisonment.

In this state does the benefit of clergy at present stand; very considerably different from it's original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

From the whole of this detail we may collect, that however in times of ignorance and superstition that monster in true policy may for a while subsist, of a body of men, residing in the bowels of a state, and yet independent of it's laws; yet, when learning and rational religion have a little enlightened men's minds, society can no longer endure an absurdity so gross, as must destroy its very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the united will of the community. This united will is declared in the laws of the land: and that united force is exerted in their due, and universal, execution. [373]

II. I am next to inquire to what *persons* the benefit of clergy is to be allowed at this day: and this must be chiefly collected from what has been observed in the preceding article. For, upon the whole, we may pronounce, that all

clerks in orders are, without any branding, and of courſe without any tranſportation, fine, or whipping, (for thoſe are only ſubſtituted in lieu of the other,) to be admitted to this privilege, and immediately diſcharged; and this as often as they offend [i] (3). Again, all lords of parliament and peers of the realm having place and voice in parliament, by the ſtatute 1 Edw. VI. c. 12. (which is likewiſe held to extend to peereſſes [k],) ſhall be diſcharged in all clergyable and other felonies, provided for by the act, without any burning in the hand or impriſonment, or other puniſhment ſubſtituted in it's ſtead, in the ſame manner as real clerks convict: but this is only for the firſt offence. Laſtly, all the commons of the realm, not in orders, whether male or female, ſhall for the firſt offence be diſcharged of the capital puniſhment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or ſuffering a diſcretionary impriſonment in the common gaol, the houſe of correction, one of the penitentiary houſes, or in the places of labour for the benefit of ſome navigation; or, in caſe of larciny, upon being tranſported for ſeven years, if the court ſhall think proper (4). It hath been ſaid, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the ſtatute 5 Ann. c. 6. as being under a legal inca-

[i] 2 Hal. P. C. 375.

[k] Ducheſs of Kinſton's caſe, in parliament, 22 Apr. 1776.

(3) But clergymen have no privilege in petty larcinies, but they are liable to be whipped or tranſported, like other perſons, for a petty larciny, though they are ſubject to no corporal puniſhment whatever, upon being convicted of a grand larciny or any clergyable felony.

(4) A layman, who has once had the benefit of clergy, may be precluded from obtaining it a ſecond time, by a counter-plea on the part of the proſecution, averring the identity of the priſoner's perſon, and that he had before been allowed the benefit of his clergy, though the ſecond crime be quite different from the firſt. As a perſon convicted of bigamy is liable to ſuffer death for a manſlaughter, or any other clergyable felony. *Scott's caſe, Leach*, 312.

pacity

pacity for orders [l]. But I much queſtion whether this was ever ruled for law, ſince the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the caſe, the Jews are ſtill in the ſame predicament, which every day's experience will contradict: the ſtatute of queen Anne having certainly made no alteration in this reſpect; it only diſpenſing with the neceſſity of reading in thoſe perſons, who, in caſe they could read, were before the act entitled to the benefit of their clergy. [374]

III. THE third point to be conſidered is, for what *crimes* the *privilegium clericale*, or benefit of clergy, is to be allowed. And, it is to be obſerved, that neither in high treaſon, nor in petit larciny, nor in any mere miſdemeſnors, it was indulged at the common law; and therefore we may lay it down for a rule, that it was allowable only in petit treaſon and capital felonies: which for the moſt part became legally intitled to this indulgence by the ſtatute *de clero*, 25 Edw. III. ſt. 3. c. 4. which provides that clerks convict for treaſons or felonies, touching other perſons than the king himſelf or his royal majeſty, ſhall have the privilege of holy church. But yet it was not allowable in all felonies whatſoever: for in ſome it was denied even by the common law, viz. *inſidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or deſtroying and ravaging a country [m]; and *combuſtio domorum*, or arſon, that is, the burning of houſes [n]: all which are a kind of hoſtile acts, and in ſome degree border upon treaſon. And farther, all theſe identical crimes, together with petit treaſon, and very many other acts of felony, are ouſted of clergy by particular acts of parliament; which have in general been mentioned under the particular offences to which they belong, and therefore need not be here recapitulated. Upon all which ſtatutes for excluding clergy I ſhall only obſerve, that they are nothing elſe but the reſtoring of the law to the ſame rigor of capital puniſhment in the firſt offence, that is exerted before the *privilegium clericale* was at all indulged; and

[l] 2 Hal. P. C. 373. 2 Hawk. P. C. 338. Foſt. 306.

[m] 2 Hal. P. C. 333.

[n] 1 Hal. P. C. 346.

which it ſtill exerts upon a ſecond offence in almoſt all kinds of felonies, unleſs committed by clerks actually in orders. But ſo tender is the law of inflicting capital puniſhment in the firſt inſtance for any inferior felony, that notwithſtanding by the marine law, as declared in ſtatute 28 Hen. VIII. c. 15. the benefit of clergy is not allowed in any caſe whatſoever; [373*] yet, when offences are committed within the admiralty-juriſdiction, which would be clergyable if committed by land, the conſtant courſe is to acquit and diſcharge the priſoner [o]. And, to conclude this head of inquiry, we may obſerve the following rules: 1. That in all felonies, whether new created or by common law, clergy is now allowable, unleſs taken away by expreſs words of an act of parliament [p]. 2. That where clergy is taken away from the principal, it is not of courſe taken away from the acceſſory, unleſs he be alſo particularly included in the words of the ſtatute [q]. 3. That, when the benefit of clergy is taken away from the *offence*, (as in caſe of murder, buggery, robbery, rape, and burglary,) a principal in the ſecond degree, being preſent, aiding, and abetting the crime, is as well excluded from his clergy as he that is principal in the firſt degree: but, 4. That, where it is only taken away from the *perſon committing* the offence, (as in the caſe of ſtabbing, or committing larciny in a dwelling-houſe (5), or privately from the perſon,) his aiders and abettors are not excluded; through the tenderneſs of the law, which hath determined that ſuch ſtatutes ſhall be taken literally [r].

IV. LASTLY, we are to inquire what the conſequences are to the party, of allowing him this benefit of clergy. I ſpeak

[o] Moor, 756. Foſt. 288.
[p] 2 Hal. P. C. 330.
[q] 2 Hawk. P. C. 341.
[r] 1 Hal. P. C. 529. Foſter 356, 357.

(5) In the caſe of all capital larcinies in a dwelling-houſe, the benefit of clergy has been taken away, as well from thoſe who aid, aſſiſt, and abet, as from thoſe who actually commit the crime, by 3 *W. & M. c.* 9. and 12 *Ann. ſt.* 1. *c.* 7. See p. 240. *ante.*

not

not of the branding, fine, whipping, imprisonment, or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest, and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy; which operates as a kind of statute pardon.

AND, we may observe, 1. That by this conviction he forfeits all his goods to the king; which, being once vested in the crown, shall not afterwards be restored to the offender [s]. 2. That, after conviction, and till he receives the judgment of the law, by branding or some of it's substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon [t]. 3. That, after burning or it's substitute, or pardon, he is discharged for ever of that, and all other felonies before committed, within the benefit of clergy; but not of felonies from which such benefit is excluded: and this by statutes 8 Eliz. c. 4. and 18 Eliz. c. 7. 4. That by the burning, or it's substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted [u]. 5. That what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in it's stead. For they have the same privileges, without any burning, or any substitute for it, which others are entitled to after it [x].

[374*]

[s] 2 Hal. P. C. 388.
[t] 3 P. Wms. 487.
[u] 2 Hal. P. C. 389. 5 Rep. 110.
[x] 2 Hal. P. C. 389, 390.

CHAPTER THE TWENTY-NINTH.

OF JUDGMENT AND IT'S CONSEQUENCES.

WE are now to consider the next stage of criminal prosecution, after trial and conviction are past, in such crimes and misdemesnors, as are either too high or too low to be included within the benefit of clergy: which is that of *judgment*. For when, upon a capital charge, the jury have brought in their verdict guilty, in the presence of the prisoner; he is either immediately, or at a convenient time soon after, asked by the court, if he has any thing to offer why judgment should not be awarded against him. And in case the defendant be found guilty of a misdemesnor, (the trial of which may, and does usually, happen in his absence, after he has once appeared,) a *capias* is awarded and issued, to bring him in to receive his judgment; and, if he absconds, he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in *arrest* or stay of judgment: as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And, if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again [a]. And we may take notice, 1. That none of the statutes of *jeofails* [b], for amendment of errors, extend to indictments or proceedings in cri-

[a] 4 Rep. 45.

[b] See Vol. III. pag. 407.

minal

minal cafes; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cafes are. 2. That, in favour of life, great ſtrictneſs has at all times been obſerved, in every point of an indictment. Sir Matthew Hale [376] indeed complains, "that this ſtrictneſs is grown to be a "blemiſh and inconvenience in the law, and the adminiſtra-"tion thereof: for that more offenders eſcape by the over-"eaſy ear given to exceptions in indictments, than by their "own innocence[c]." And yet no man was more tender of life than this truly excellent judge.

A PARDON alſo, as has been before ſaid, may be pleaded in arreſt of judgment: and it has the ſame advantage when pleaded here, as when pleaded upon arraignment; *viz.* the ſaving the attainder, and of courſe the corruption of blood: which nothing can reſtore but parliament, when a pardon is not pleaded till after ſentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as ſoon as poſſible.

PRAYING the benefit of clergy may alſo be ranked among the motions in arreſt of judgment: of which we ſpoke largely in the preceding chapter.

IF all theſe reſources fail, the court muſt pronounce that judgment, which the law hath annexed to the crime, and which hath been conſtantly mentioned, together with the crime itſelf, in ſome or other of the former chapters. Of theſe ſome are capital, which extend to the life of the offender, and conſiſt generally in being hanged by the neck till dead; though in very atrocious crimes other circumſtances of terror, pain, or diſgrace are ſuperadded: as, in treaſons of all kinds, being drawn or dragged to the place of execution; in high treaſon affecting the king's perſon or government, embowelling alive, beheading, and quartering; and in murder, a public diſſection. And, in caſe of any treaſon com-

[c] 2 Hal. P. C. 193.

mitted by a female, the judgment is to be burned alive (1). But the humanity of the Engliſh nation has authorized, by a tacit conſent, an almoſt general mitigation of ſuch part of theſe judgments, as favours of torture or cruelty: a ſledge or hurdle
[377] being uſually allowed to ſuch traitors as are condemned to be drawn; and there being very few inſtances (and thoſe accidental or by negligence) of any perſons being embowelled or burned, till previouſly deprived of ſenſation by ſtrangling. Some puniſhments conſiſt in exile or baniſhment, by abjuration of the realm, or tranſportation: others in loſs of liberty, by perpetual or temporary impriſonment. Some extend to confiſcation, by forfeiture of lands, or moveables, or both, or of the profits of lands for life: others induce a diſability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occaſion a mutilation or diſmembering, by cutting off the hand or ears: others fix a laſting ſtigma on the offender, by ſlitting the noſtrils, or branding in the hand or cheek. Some are merely pecuniary, by ſtated or diſcretionary fines: and laſtly there are others, that conſiſt principally in their ignominy, though moſt of them are mixed with ſome degree of corporal pain; and theſe are inflicted chiefly for ſuch crimes, as either ariſe from indigence, or render even opulence diſgraceful. Such as whipping, hard labour in the houſe of correction or otherwiſe, the pillory, the ſtocks, and the ducking-ſtool.

DISGUSTING as this catalogue may ſeem, it will afford pleaſure to an Engliſh reader, and do honour to the Engliſh law, to compare it with that ſhocking apparatus of death and torment, to be met with in the criminal codes of almoſt every other nation in Europe. And it is moreover one of the glories of our Engliſh law, that the ſpecies, though not always the quantity or degree, of puniſhment is *aſcertained* for every offence; and that it is not left in the breaſt of any

(1) But this is now altered by 30 Geo. III. c. 48. See p. 204. n. 7. *ante*.

judge,

judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every ſubject alike, without reſpect of perſons. For, if judgments were to be the private opinions of the judge, men would then be ſlaves to their magiſtrates; and would live in ſociety, without knowing exactly the conditions and obligations which it lays them under. And beſides, as this prevents oppreſſion on the one hand, ſo on the other it ſtifles all hopes of impunity or mitigation; with which an offender might flatter himſelf, [378] if his puniſhment depended on the humour or diſcretion of the court. Whereas, where an eſtabliſhed penalty is annexed to crimes, the criminal may read their certain conſequence in that law: which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

THE diſcretionary fines and diſcretionary length of impriſonment, which our courts are enabled to impoſe, may ſeem an exception to this rule. But the general nature of the puniſhment, *viz.* by fine or impriſonment, is, in theſe caſes, fixed and determinate: though the duration and quantity of each muſt frequently vary, from the aggravations or otherwiſe of the offence, the quality and condition of the parties, and from innumerable other circumſtances. The *quantum*, in particular, of pecuniary fines neither can, nor ought to be aſcertained by any invariable law. The value of money itſelf changes from a thouſand cauſes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the twelve tables at Rome fined every perſon, that ſtruck another, five and twenty *denarii*: this, in the more opulent days of the empire, grew to be a puniſhment of ſo little conſideration, that Aulus Gellius tells a ſtory of one Lucius Neratius, who made it his diverſion to give a blow to whomſoever he pleaſed, and then tender them the legal forfeiture. Our ſtatute law has not therefore often aſcertained the quantity of fines, nor the common law ever; it directing ſuch an offence to be puniſhed by fine in general, without ſpecifying the certain ſum; which is fully ſufficient, when we conſider, that however

ever unlimited the power of the court may seem, it is far from being wholly arbitrary; but it's discretion is regulated by law. For the bill of rights [d] has particularly declared, that excessive fines ought not to be imposed, nor cruel and unusual punishments inflicted: (which had a retrospect to some unprecedented proceedings in the court of king's bench, in the reign of king James the second:) and the same statute
[379] farther declares, that all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void. Now the bill of rights was only declaratory of the old constitutional law: and accordingly we find it expressly holden, long before [e], that all such previous grants are void; since thereby many times undue means, and more violent prosecution, would be used for private lucre, than the quiet and just proceeding of law would permit.

THE reasonableness of fines in criminal cases has also been usually regulated by the determination of *magna charta*, c. 14. concerning amercements for misbehaviour by the suiters in matters of civil right. "*Liber homo non amercie-*
"*tur pro parvo delicto, nisi secundum modum ipsius delicti; et*
"*pro magno delicto, secundum magnitudinem delicti; salvo*
"*contenemento suo; et mercator eodem modo, salva mercandisa*
"*sua; et villanus eodem modo amercietur, salvo wainagio suo.*"
A rule, that obtained even in Henry the second's time [f], and means only, that no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear; saving to the landholder his contenement (2), or

[d] Stat. 1 W & M. st. 2. c. 2.
[e] 2 Inst. 48.
[f] Glanv. l. 9. c. 8. & 11.

(2) Lord Coke says, that "contenement signifieth his counte-
"nance, as the armour of a soldier is his countenance, the books
"of a scholar his countenance, and the like." 2 *Inst.* 28. He also adds, that "the *wainagium* is the countenance of the villain,
"and it was great reason to save his wainage, for otherwise the
"miserable creature was to carry the burden on his back." *Ibid.*

land;

land; to the trader his merchandize; and to the countryman his wainage, or team and inſtruments of huſbandry. In order to aſcertain which, the great charter alſo directs, that the amercement, which is always inflicted in general terms ("*ſit in miſericordia*") ſhall be ſet, *ponatur*, or reduced to a certainty by the oath of good and lawful men of the neighbourhood. Which method, of liquidating the amercement to a preciſe ſum, was uſually performed in the ſuperior courts by the aſſeſſment or *affeerment* of the coroner, a ſworn officer choſen by the neighbourhood, under the equity of the ſtatute Weſtm. 1. c. 18; and then the judges eſtreated them into the exchequer[g]. But in the court leet and court baron it is ſtill performed by *affeerors*, or ſuitors ſworn to *affeere*, that is, tax and moderate the *general* amercement according to the *particular* circumſtances of the offence and the offender[h]. Amercements impoſed by the ſuperior courts [380] on their own officers and miniſters were affeered by the judges themſelves; but when a pecuniary mulct was inflicted by them on a ſtranger (not being party to any ſuit) it was then denominated a *fine*[i]; and the antient practice was, when any ſuch fine was impoſed, to inquire by a jury "*quantum inde regi dare valeat per annum, ſalva ſuſtentatione "ſua, et uxoris, et liberorum ſuorum*[j]." And ſince the diſuſe of ſuch inqueſt, it is never uſual to aſſeſs a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal puniſhment, or a limited impriſonment, inſtead of ſuch fine as might amount to impriſonment for life. And this is the reaſon why fines in the king's court are frequently denominated ranſoms, becauſe the penalty muſt otherwiſe fall upon a man's perſon, unleſs it be redeemed or ranſomed by a pecuniary fine[k]: according to an antient maxim, *qui non habet in crumena luat in corpore*. Yet, where any ſtatute ſpeaks both of fine and ran-

[g] F. N. B. 76.

[h] The affeeror's oath is conceived in the very terms of *magna carta*. Fitzh. Survey, ch. 11.

[i] 8 Rep. 40.

[j] Gilb. Exch. c. 5.

[k] Mirr. c. 5. § 3. Lamb. *Eirenarch*, 575.

ſom,

fom, it is holden, that the ranſom ſhall be treble to the fine at leaſt [l].

WHEN ſentence of death, the moſt terrible and higheſt judgment in the laws of England, is pronounced, the immediate inſeparable conſequence from the common law is *attainder*. For when it is now clear beyond all diſpute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monſter and a bane to human ſociety, the law ſets a note of infamy upon him, puts him out of it's protection, and takes no farther care of him than barely to ſee him executed. He is then called attaint, *attinctus*, ſtained or blackened. He is no longer of any credit or reputation; he cannot be a witneſs in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his puniſhment, he is already dead in law [m]. This is after *judgment*: for there is great difference between a man *convicted* and *attainted*; though they are frequently through inaccuracy confounded together. After conviction only, a man is liable to none of theſe diſabilities: for there is ſtill in contemplation of law a poſſibility of his innocence. Something may be offered in arreſt of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the preſent conviction may be quaſhed: he may obtain a pardon, or be allowed the benefit of clergy: both which ſuppoſe ſome latent ſparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conſpire to prove him completely guilty; and there is not the remoteſt poſſibility left of any thing to be ſaid in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon ſuch circumſtances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for abſconding or fleeing from juſtice, which tacitly confeſſes the guilt. And therefore either upon judgment of outlawry, or of death, for treaſon or felony, a man ſhall be ſaid to be attainted.

[381]

[l] Dyer, 232.

[m] 3 Inſt. 213.

THE

THE conſequences of attainder are forfeiture and corruption of blood.

I. FORFEITURE is twofold; of real, and perſonal eſtates. Firſt, as to real eſtates: by attainder in high treaſon [n] a man forfeits to the king all his lands and tenements of inheritance, whether fee-ſimple or fee-tail, and all his rights of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to be for ever veſted in the crown: and alſo the profits of all lands and tenements, which he had in his own right for life or years, ſo long as ſuch intereſt ſhall ſubſiſt. This forfeiture relates backwards to the time of the treaſon committed: ſo as to avoid all intermediate ſales and incumbrances [o], but not thoſe before the fact: and therefore a wife's jointure is not forfeitable for the treaſon of her huſband; becauſe ſettled upon her previous to the treaſon committed. But her dower is forfeited by the expreſs proviſion of ſtatute 5 & 6 Edw. VI. [382] c. 11. And yet the huſband ſhall be tenant by the curteſy of the wife's lands, if the wife be attainted of treaſon [p]: for that is not prohibited by the ſtatute. But, though after attainder the forfeiture relates back to the time of the treaſon committed, yet it does not take effect unleſs an attainder be had, of which it is one of the fruits: and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands: for he never was attainted of treaſon [q]. But if the chief juſtice of the king's bench (the ſupreme coroner of all England) in perſon, upon the view of the body of one killed in open rebellion, records it and returns the record into his own court, both lands and goods ſhall be forfeited [r].

THE natural juſtice of forfeiture or confiſcation of property, for treaſon [s], is founded on this conſideration: that

[n] Co. Litt. 392. 3 Inſt. 19. 1 Hal. P. C. 240. 2 Hawk. P. C. 448.
[o] 3 Inſt. 211.
[p] 1 Hal. P. C. 359.
[q] Co. Litt. 13.
[r] 4 Rep. 57.
[s] See Vol. I. pag. 259.

he

he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with society; and hath no longer any right to those advantages, which before belonged to him purely as a member of the community: among which *social* advantages the right of transferring or transmitting property to others is one of the chief. Such forfeitures moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections; and will interest every dependent and relation he has, to keep him from offending: according to that beautiful sentiment of Cicero [s], "*nec vero me fugit quam sit acerbum, parentum scelera filiorum* "*poenis lui: sed hoc praeclare legibus comparatum est, ut caritas* "*liberorum amiciores parentes reipublicae redderet.*" And therefore Aulus Cascellius, a Roman lawyer in the time of the triumvirate, used to boast that he had two reasons for de-
[383] spising the power of the tyrants; his old age, and his want of children: for children are pledges to the prince of the father's obedience [t]. Yet many nations have thought, that this posthumous punishment favours of hardship to the innocent; especially for crimes that do not strike at the very root and foundation of society; as treason against the government expressly does. And therefore, though confiscations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius in every other instance but that of treason thought it more just, "*ibi esse poenam, ubi et noxa est*;" and ordered that "*peccata suos teneant auctores, nec ulterius progre-*"*diatur metus, quam reperiatur delictum* [v]:" and Justinian also made a law to restrain the punishment of relations [u]; which directs the forfeiture to go, except in the case of *crimen majestatis*, to the next of kin to the delinquent. On the other hand the Macedonian laws extended even the capital punishment of treason, not only to the children but to all the

[s] *ad Brutum, ep.* 12.
[t] Gravin. 1. § 68.
[v] *Cod.* 9. 47. 22.
[u] *Nov.* 134. *c.* 13.

relations

relations of the delinquent [w]: and of course their estates must be also forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle [x], (copied almost *verbatim* from Justinian's code [y],) the lives of the sons of such as conspire to kill an elector are spared, as it is expressed, by the emperor's *particular bounty*. But they are deprived of all their effects and rights of succession, and are rendered incapable of any honour ecclesiastical or civil: "to the end "that, being always poor and necessitous, they may for ever "be accompanied by the infamy of their father: may languish in continual indigence; and may find (says this "merciless edict) their punishment in living, and their re-"lief in dying."

WITH us in England, forfeiture of lands and tenements to the crown for treason is by no means derived from the feodal policy, (as has been already observed [z],) but was antecedent to the establishment of that system in this island; being transmitted from our Saxon ancestors [a], and forming a [384] part of the antient Scandinavian constitution [b]. But in certain treasons relating to the coin, (which, as we formerly observed, seem rather a species of the *crimen falsi*, than the *crimen laesae majestatis*,) it is provided by some of the modern statutes [c] which constitute the offence, that it shall work no forfeiture of lands, save only for the life of the offender; and by all, that it shall not deprive the wife of her dower [d]. And, in order to abolish such hereditary punishment entirely, it was enacted by statute 7 Ann. c. 21. that after the decease of the late pretender, no attainder for treason should extend to the disinheriting of any heir, nor to the prejudice of any person, other than the traitor himself. By which, the law of forfeitures for high treason would by this time have been at an end, had not a subsequent statute intervened to give

[w] Qu. Curt. *l.* 6.
[x] *cap.* 24.
[y] *l.* 9. *t.* 8. *l.* 5.
[z] See Vol. II. pag. 251.
[a] *LL. Aelfr. c.* 4. *Canut. c.* 54.
[b] Stiernh. *de jure Goth. l.* 2. *c.* 6. & *l.* 3. *c.* 3.
[c] Stat. 5 Eliz. c. 11. 18 Eliz. c. 1.
[d] *Ibid.* 8 & 9. Will. III. c. 26. 15 & 16 Geo. II. c. 28.

them

them a longer duration. The hiſtory of this matter is ſomewhat ſingular and worthy obſervation. At the time of the union, the crime of treaſon in Scotland was, by the Scots law, in many reſpects different from that of treaſon in England; and particularly in it's conſequence of forfeitures of entailed eſtates, which was more peculiarly Engliſh; yet it ſeemed neceſſary that a crime ſo nearly affecting government ſhould both in it's eſſence and conſequences, be put upon the ſame footing in both parts of the united kingdoms. In new-modelling theſe laws, the Scotch nation and the Engliſh houſe of commons ſtruggled hard, partly to maintain, and partly to acquire, a total immunity from forfeiture and corruption of blood: which the houſe of lords as firmly reſiſted. At length a compromiſe was agreed to, which is eſtabliſhed by this ſtatute, *viz.* that the ſame crimes, and no other, ſhould be treaſon in Scotland that are ſo in England; and that the Engliſh forfeitures and corruption of blood ſhould take place in Scotland, till the death of the then pretender; and then ceaſe throughout the whole of Great Britain [e]: the lords artfully propoſing this temporary clauſe, in
[385] hopes (it is ſaid [f]) that the prudence of ſucceeding parliaments would make it perpetual [g]. This has partly been done by the ſtatute 17 Geo. II. c. 39. (made in the year preceding the late rebellion) the operation of theſe indemnifying clauſes being thereby ſtill farther ſuſpended, till the death of the ſons of the pretender [h] (3).

[e] Burnet's Hiſt. *A. D.* 1709.

[f] Conſiderations on the law of forfeiture, 6.

[g] See Foſt. 250.

[h] The juſtice and expediency of this proviſion were defended at the time, with much learning and ſtrength of argument, in the *conſiderations on the law of forfeiture*, firſt publiſhed *A. D.* 1744 (See Vol. I. pag. 244.)

(3) By the 39 Geo. III. c. 93. the clauſe in the 7 Ann. c. 21. and that in the 17 Geo. II. c. 39. limiting the periods when forfeiture for treaſon ſhould be aboliſhed, are repealed. So the law of forfeiture in caſes of high treaſon is now the ſame as it was by the common law, or as it ſtood prior to the ſeventh year of the reign of queen Anne.

IN petit treaſon and felony, the offender alſo forfeits all his chattel intereſts abſolutely, and the profits of all eſtates of freehold during life; and, after his death, all his lands and tenements in fee ſimple (but not thoſe in tail) to the crown, for a very ſhort period of time: for the king ſhall have them for a year and a day, and may commit therein what waſte he pleaſes; which is called the king's *year, day,* and *waſte*[i]. Formerly the king had only a liberty of committing waſte on the lands of felons, by pulling down their houſes, extirpating their gardens, ploughing their meadows, and cutting down their woods. And a puniſhment of a ſimilar ſpirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus in the books of Daniel[k] and Ezra[l]; which, beſides the pain of death inflicted on the delinquents there ſpecified, ordain, "that their houſes ſhall be made a dunghill." But this tending greatly to the prejudice of the public, it was agreed in the reign of Henry the firſt, in this kingdom, that the king ſhould have the profits of the land for one year and a day, in lieu of the deſtruction he was otherwiſe at liberty to commit[m]: and therefore *magna charta*[n] provides, that the king ſhall only hold ſuch lands for a year and a day, and then reſtore them to the lord of the fee; without any mention made of waſte. But the ſtatute 17 Edw. II. *de praerogativa regis* ſeems to ſuppoſe, that the king ſhall have his year, day, *and* waſte: and not the year and day *inſtead of* [386] waſte. Which ſir Edward Coke (and the author of the mirror before him) very juſtly look upon as an encroachment, though a very antient one, of the royal prerogative[o]. This year, day, and waſte are now uſually compounded for; but otherwiſe they regularly belong to the crown; and, after their expiration, the land would naturally have deſcended to the heir, (as in gavelkind tenure it ſtill does,) did not it's feodal quality intercept ſuch deſcent, and give it by way of

[i] 2 Inſt. 37.
[k] ch. iii. v. 29.
[l] ch. vi. v. 11.
[m] Mirr. c. 4. § 16. *Flet. l.* 1. *c.* 28.
[n] 9 *Hen. III. c.* 22.
[o] Mirr. c. 5. § 2. 2 Inſt. 37.

eſcheat to the lord. Theſe forfeitures for felony do alſo ariſe only upon attainder: and therefore a *felo de ſe* forfeits no lands of inheritance or freehold, for he never is attainted as a felon [p]. They likewiſe relate back to the time of the offence committed, as well as forfeitures for treaſon; ſo as to avoid all intermediate charges and conveyances. This may be hard upon ſuch as have unwarily engaged with the offender: but the cruelty and reproach muſt lie on the part, not of the law, but of the criminal; who has thus knowingly and diſhoneſtly involved others in his own calamities.

THESE are all the forfeitures of real eſtates, created by the common law, as conſequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the ſtatutes of *praemunire* and others: becauſe I look upon them rather as a *part* of the judgment and penalty, inflicted by the reſpective ſtatutes, than as *conſequences* of ſuch judgment; as in treaſon and felony they are. But I ſhall juſt mention, as a part of the forfeiture of real eſtates, the forfeiture of the profits of lands during life: which extends to two other inſtances, beſides thoſe already ſpoken of, miſpriſion of treaſon [q], and ſtriking in Weſtminſter-hall, or drawing a weapon upon a judge there, ſitting in the king's courts of juſtice [r].

THE forfeiture of goods and chattels accrues in every one of the higher kinds of offence: in high treaſon or miſpriſion
[387] thereof, petit treaſon, felonies of all ſorts whether clergyable or not, ſelf-murder or felony *de ſe*, petit larciny, ſtanding mute, and the above-mentioned offences of ſtriking, &c. in Weſtminſter-hall. For *flight* alſo, on an accuſation of treaſon, felony, or even petit larciny, whether the party be found guilty or acquitted, if the jury find the flight, the party ſhall forfeit his goods and chattels: for the very flight is an offence, carrying with it a ſtrong preſumption of guilt, and is at leaſt an endeavour to elude and ſtifle the courſe of juſtice preſcribed by the law. But the jury very ſeldom find

[p] 3 Inſt. 55. [q] *Ibid.* 218. [r] *Ibid.* 141.

the flight [r]: forfeiture being looked upon, ſince the vaſt increaſe of perſonal property of late years, as too large a penalty for an offence, to which a man is prompted by the natural love of liberty.

THERE is a remarkable difference or two between the forfeiture of lands, and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction*. Becauſe in many of the caſes where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given: therefore in thoſe caſes the forfeiture muſt be upon conviction, or not at all; and being neceſſarily upon conviction in thoſe, it is ſo ordered in all other caſes, for the law loves uniformity. 2. In outlawries for treaſon or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man's being firſt put in the *exigent*, without ſtaying till he is *quinto exactus*, or finally outlawed; for the ſecreting himſelf ſo long from juſtice, is conſtrued a flight in law [s]. 3. The forfeiture of lands has relation to the time of the fact committed, ſo as to avoid all ſubſequent ſales and incumbrances: but the forfeiture of goods and chattels has no relation backwards; ſo that thoſe only which a man has at the time of conviction ſhall be forfeited. Therefore a traitor or felon may *bona fide* ſell any of his chattels, real or perſonal, for the ſuſtenance of himſelf and family between the fact and conviction [t]: for perſonal property is of ſo fluctuating a nature, that it paſſes through many hands in [388] a ſhort time; and no buyer could be ſafe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treaſon or felony. Yet if they be colluſively and not *bona fide* parted with, merely to defraud the crown, the law (and particularly the ſtatute 13 Eliz. c. 5.) will reach them; for they are all the while truly and ſubſtantially the goods of the offender: and as he, if acquitted, might recover them himſelf, as not parted with for

[r] Staundf. P. C. 183. b. [s] 3 Inſt. 232. [t] 2 Hawk. P. C. 454.

a good consideration; so in case he happens to be convicted, the law will recover them for the king.

II. ANOTHER immediate consequence of attainder is the *corruption of blood*, both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture: and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor [u].

THIS is one of those notions which our laws have adopted from the feodal constitutions, at the time of the Norman conquest; as appears from it's being unknown in those tenures which are indisputably Saxon, or gavelkind: wherein, though by treason, according to the antient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of descents, ensues; and, on judgment of mere felony, no escheat accrues to the lord. And therefore, as every other oppressive mark of feodal tenure is now happily worn away in these kingdoms, it is to be hoped, that this *corruption of blood*, with all it's connected consequences, not only of present escheat, but of future incapacities of inheritance even to the twentieth generation, may in process of time be abolished by act of parliament: as it stands upon a very different footing from the forfeiture of lands for high
[389] treason, affecting the king's person or government. And indeed the legislature has, from time to time, appeared very inclinable to give way to so equitable a provision; by enacting, that, in certain treasons respecting the papal supremacy [w] and the public coin [x], and in many of the new-made felonies, created since the reign of Henry the eighth by act of

[u] See Vol. II. pag. 251.
[w] Stat. 5 Eliz. c. 1.
[x] Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. 8 & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

parliament,

parliament, corruption of blood ſhall be ſaved. But as in ſome of the acts for creating felonies (and thoſe not of the moſt atrocious kind) this ſaving was neglected, or forgotten, to be made, it ſeems to be highly reaſonable and expedient to antiquate the whole of this doctrine by one undiſtinguiſhing law: eſpecially as by the afore-mentioned ſtatute of 7 Ann. c. 21. (the operation of which is poſtponed by ſtatute 17 Geo. II. c. 39.) after the death of the ſons of the late pretender, no attainder for treaſon will extend to the diſinheriting any heir, nor the prejudice of any perſon, other than the offender himſelf; which virtually aboliſhes all corruption of blood for treaſon, though (unleſs the legiſlature ſhould interpoſe) it will ſtill continue for many ſorts of felony (4).

(4) The law of forfeiture in high treaſon is reſtored. *See ante* p. 385. n. 3.

CHAPTER THE THIRTIETH.

OF REVERSAL OF JUDGMENT.

WE are next to consider how judgments, with their several connected consequences, of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A JUDGMENT may be falsified, reversed, or avoided, in the first place, *without a writ of error*, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself: and therefore, if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a *diminution* of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void; and may be falsified by shewing the special matter, without writ of error. As, where a commission issues to A and B, and twelve others, or any two of them, of which A or B shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence [391] of either A, or B: in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection

inſpection without the trouble of a writ of error [a]; it being a high miſdemeſnor in the judges ſo proceeding, and little (if any thing) ſhort of murder in them all, in caſe the perſon ſo attainted be executed and ſuffer death. So likewiſe if a man purchaſes land of another; and afterwards the vendor is, either by outlawry or his own confeſſion, convicted and attainted of treaſon or felony previous to the ſale or alienation; whereby ſuch land becomes liable to forfeiture or eſcheat: now, upon any trial the purchaſer is at liberty, without bringing any writ of error, to falſify not only the time of the felony or treaſon ſuppoſed, but the very point of the felony or treaſon itſelf; and is not concluded by the confeſſion or the outlawry of the vendor; though the vendor himſelf is concluded, and not ſuffered now to deny the fact, which he has by confeſſion or flight acknowledged. But if ſuch attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falſify or contradict the *fact* of the crime committed; though he is at liberty to prove a miſtake in *time*, or that the offence was committed after the alienation, and not before [b].

SECONDLY, a judgment may be reverſed, *by writ of error*: which lies from all inferior criminal juriſdictions to the court of king's bench, and from the king's bench to the houſe of peers; and may be brought for notorious miſtakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other leſs palpable errors; ſuch as any irregularity, omiſſion, or want of form in the proceſs of outlawry, or proclamations; the want of a proper *addition* to the defendant's name, according to the ſtatute of additions; for not properly naming the ſheriff or other officer of the court, or not duly deſcribing where his county court was held; for laying an offence, committed in the time of the late king, to be done againſt the peace of the preſent; and for many other ſimilar cauſes, which (though allowed out of tenderneſs to life and [392]

[a] 2 Hawk. P. C. 459. [b] 3 Inſt. 231. 1 Hal. P. C. 361.

liberty) are not much to the credit or advancement of the national juſtice. Theſe writs of error, to reverſe judgements in caſe of miſdemeſnors, are not to be allowed of courſe, but on ſufficient probable cauſe ſhewn to the attorney-general; and then they are underſtood to be grantable of common right, and *ex debito juſtitiae*. But writs of error to reverſe attainders in capital caſes are only allowed *ex gratia*; and not without expreſs warrant under the king's ſign manual, or at leaſt by the conſent of the attorney-general [c]. Theſe therefore can rarely be brought by the party himſelf, eſpecially where he is attainted for an offence againſt the ſtate: but they may be brought by his heir, or executor, after his death, in more favourable times; which may be ſome conſolation to his family. But the eaſier, and more effectual way, is,

LASTLY, to reverſe the attainder by act of parliament. This may be and hath been frequently done, upon motives of compaſſion, or perhaps from the zeal of the times, after a ſudden revolution in the government, without examining too cloſely into the truth or validity of the errors aſſigned. And ſometimes, though the crime be univerſally acknowledged and confeſſed, yet the merits of the criminal's family ſhall after his death obtain a reſtitution in blood, honours, and eſtate, or ſome, or one of them, by act of parliament; which (ſo far as it extends) has all the effect of reverſing the attainder, without caſting any reflections upon the juſtice of the preceding ſentence (1).

THE effect of falſifying, or reverſing, an outlawry is that the party ſhall be in the ſame plight as if he had appeared upon the *capias*: and, if it be before plea pleaded, he ſhall be put to plead to the indictment; if after conviction, he

[c] 1 Vern. 170. 175.

(1) This has been lately done with reſpect to the forfeited eſtates in Scotland, by ſtatute 24 Geo. III. c. 57.

ſhall

ſhall receive the ſentence of the law: for all the other proceedings, except only the proceſs of outlawry for his non-appearance, remain good and effectual as before. But when [393] judgment, pronounced upon conviction, is falſified or reverſed, all former proceedings are abſolutely ſet aſide, and the party ſtands as if he had never been at all accuſed; reſtored in his credit, his capacity, his blood, and his eſtates: with regard to which laſt, though they be granted away by the crown, yet the owner may enter upon the grantee, with as little ceremony as he might enter upon a diſſeiſor[d]. But he ſtill remains liable to another proſecution for the ſame offence: for, the firſt being erroneous, he never was in jeopardy thereby.

[d] 2 Hawk. P. C. 462.

CHAPTER THE THIRTY-FIRST.

OF REPRIEVE AND PARDON.

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

I. A REPRIEVE, from *reprendre*, to take back, is the withdrawing of a ſentence for an interval of time: whereby the execution is ſuſpended. This may be, firſt, *ex arbitrio judicis*; either before or after judgment: as, where the judge is not ſatisfied with the verdict, or the evidence is ſuſpicious, or the indictment is inſufficient, or he is doubtful whether the offence be within clergy; or ſometimes if it be a ſmall felony, or any favourable circumſtances appear in the criminal's character, in order to give room to apply to the crown for either an abſolute or conditional pardon. Theſe arbitrary reprieves may be granted or taken off by the juſtices of gaol delivery, although their ſeſſion be finiſhed, and their commiſſion expired: but this rather by common uſage, than of ſtrict right [a].

REPRIEVES may alſo be *ex neceſſitate legis*; as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cauſe to ſtay the judgment, yet it is to reſpite the execution till ſhe be delivered. This is a mercy

[a] 2 Hal. P. C. 412.

dictated

dictated by the law of nature, *in favorem prolis:* and therefore no part of the bloody proceedings, in the reign of queen Mary, hath been more juſtly deteſted than the cruelty, that was exerciſed in the iſland of Guernſey, of burning a woman big with child: and when, through the violence of the flames, the infant ſprang forth at the ſtake, and was preſerved by the byſtanders, after ſome deliberation of the prieſts who aſſiſted at the ſacrifice, they caſt it again into the fire as a young heretic [b]. A barbarity which they never learned from the laws of *antient* Rome, which direct [c], with the ſame humanity as our own, "*quod praegnantis mulieris damnatae* "*poena differatur, quoad pariat:*" which doctrine has alſo prevailed in England, as early as the firſt memorials of our law will reach [d]. In caſe this plea be made in ſtay of execution, the judge muſt direct a jury of twelve matrons or diſcreet women to enquire the fact: and if they bring in their verdict *quick with child* (for barely, *with child*, unleſs it be alive in the womb, is not ſufficient) execution ſhall be ſtaid generally till the next ſeſſion; and ſo from ſeſſion to ſeſſion, till either ſhe is delivered, or proves by the courſe of nature, not to have been with child at all. But if ſhe once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, ſhe ſhall not be entitled to the benefit of a farther reſpite for that cauſe [e]. For ſhe may now be executed before the child is quick in the womb; and ſhall not, by her own incontinence, evade the ſentence of juſtice (1).

ANOTHER cauſe of regular reprieve is, if the offender become *non compos*, between the judgment and the award of

[b] Fox, Acts and Mon.
[c] *Ff.* 48. 19. 3.
[d] Flet. *l.* 1. *c.* 38.
[e] 1 Hal. P. C. 369.

(1) As the execution of the law in the firſt inſtance is reſpited not from a regard for the mother, but from tenderneſs towards the innocent infant; if then it ſhould happen that ſhe becomes quick of a ſecond child, this ſurely is as much an object of compaſſion and humanity as the firſt.

execution:

execution[f]: for regularly, as was formerly[g] obſerved, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he ſhall not be indicted; if after indictment, he ſhall not be convicted; if after conviction, he ſhall not receive judgment; if after judgment, he
[396] ſhall not be ordered for execution: for "*furioſus ſolo furore* "*punitur*," and the law knows not but he might have offered ſome reaſon, if in his ſenſes, to have ſtayed theſe reſpective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the priſoner what he hath to allege, why execution ſhould not be awarded againſt him: and if he appears to be inſane, the judge in his diſcretion may and ought to reprieve him (2). Or, the party may *plead* in bar of execution; which plea may be either pregnancy, the

[f] 1 Hal. P. C. 370. [g] See pag. 24.

(2) By the 39 & 40 *Geo.* 3. *c.* 94. it is enacted, that in all trials for treaſon, murder, and felony, if evidence is produced that the priſoner was inſane, and he is acquitted, the jury ſhall be required to find ſpecially, whether he was inſane at the commiſſion of the crime, and to declare that he was acquitted on that account; and if they ſo find, the court ſhall order the priſoner to be confined in ſuch place and manner as it ſhall think fit, till his majeſty gives further orders with reſpect to the cuſtody of the lunatic.

The ſame may be done with priſoners found inſane upon arraignment, or brought before the court for want of proſecution.

And where inſane perſons manifeſt a purpoſe of committing ſome indictable crime, they may be committed by one juſtice, and ſhall not be bailed but by the ſame together with another juſtice, or by the ſeſſions, one of the judges, or the chancellor.

Where there is reaſon to apprehend danger to his majeſty's perſon from the intruſion of any lunatic, and this appears upon his examination before the privy-council, or one of the ſecretaries of ſtate, the chancellor may iſſue a commiſſion of lunacy to inquire whether ſuch perſon is inſane, and whether danger may be apprehended to his majeſty's perſon: and if a jury ſo find, the chancellor may take order for the ſafe cuſtody of the lunatic as long as there is reaſon to apprehend ſuch danger.

king's

king's pardon, an act of grace, or diversity of person, *viz.* that he is not the same as was attainted, and the like. In this last case a jury shall be impanelled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent; for that has been decided before. And in these collateral issues the trial shall be *instanter* [h], and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted [i]: neither shall any peremptory challenges of the jury be allowed the prisoner [j]; though formerly such challenges were held to be allowable, whenever a man's life was in question [k].

II. If neither pregnancy, insanity, non-identity, nor other plea will avail to avoid the judgment, and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious *pardon;* the granting of which is the most amiable prerogative of the crown. Law (says an able writer) cannot be framed on principles of compassion to guilt: yet justice, by the constitution of England, is bound to be administered in mercy: this is promised by the king in his coronation oath, and it is that act of his government which is the most personal, and most entirely his own [l]. The king himself condemns no man; that rugged task he leaves to his courts of justice: the great operation of his sceptre is mercy. His power of pardoning was said by our Saxon ancestors [m] to be derived *a lege suae dignitatis:* and it is declared in parliament, by statute 27 Hen. VIII. c. 24. that no other person hath power to pardon or remit any treason or felonies whatsoever; but that the king hath the whole and sole power thereof, united and knit to the imperial crown of this realm [n]. [397]

[h] 1 Sid. 72. See Append. § 3.
[i] Foft. 42.
[j] 1 Lev. 61. Foft. 42. 46.
[k] Staundf. P. C 163. Co. Litt. 157. Hal. Sum. 259.
[l] Law of forfeit. 99.
[m] *LL. Edw. Conf. c.* 18.
[n] And this power belongs only to a king *de facto*, and not to a king *de jure* during the time of usurpation. (Bro. Abr. *t. charter de pardon*, 22.)

THIS

THIS is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magiſtrate, who has it in his power to extend mercy, wherever he thinks it is deſerved: holding a court of equity in his own breaſt, to ſoften the rigour of the general law, in ſuch criminal caſes as merit an exemption from puniſhment. Pardons (according to ſome theoriſts [o]) ſhould be excluded in a perfect legiſlation, where puniſhments are mild but certain: for that the clemency of the prince ſeems a tacit diſapprobation of the laws. But the excluſion of pardons muſt neceſſarily introduce a very dangerous power in the judge or jury, that of conſtruing the criminal law by the ſpirit inſtead of the letter [p]; or elſe it muſt be holden, what no man will ſeriouſly avow, that the ſituation and circumſtances of the offender (though they alter not the eſſence of the crime) ought to make no diſtinction in the puniſhment. In democracies, however, this point of pardon can never ſubſiſt; for there nothing higher is acknowleged than the magiſtrate who adminiſters the laws: and it would be impolitic for the power of judging and of pardoning to center in one and the ſame perſon. This (as the preſident Monteſquieu obſerves [q]) would oblige him very often to contradict himſelf, to make and to unmake his deciſions: it would tend to confound all ideas of right among the maſs of the people; as they would find it difficult to tell, whether a priſoner were diſcharged by his innocence, or obtained a pardon through favour. In
[398] Holland therefore, if there be no ſtadtholder, there is no power of pardoning lodged in any other member of the ſtate. But in monarchies the king acts in a ſuperior ſphere; and though he regulates the whole government as the firſt mover, yet he does not appear in any of the diſagreeable or invidious parts of it. Whenever the nation ſee him perſonally engaged, it is only in works of legiſlature, magnificence, or compaſſion. To him therefore the people look up as the fountain of nothing but bounty and grace: and theſe repeated acts of goodneſs, coming immediately from his own

[o] Beccar. ch. 46. [p] *Ibid.* ch. 4. [q] Sp. L. b. 6. c. 5.

hand,

hand, endear the ſovereign to his ſubjects, and contribute more than any thing to root in their hearts that filial affection, and perſonal loyalty, which are the ſure eſtabliſhment of a prince.

UNDER this head, of pardons, let us briefly conſider, 1. The *object* of pardon: 2. The *manner* of pardoning: 3. The method of *allowing* a pardon: 4. The *effect* of ſuch pardon, when allowed.

1. AND, firſt, the king may pardon all offences merely againſt the crown, or the public; excepting, 1. That, to preſerve the liberty of the ſubject, the committing any man to priſon out of the realm, is by the *habeas corpus* act, 31 Car. II. c. 2. made a *praemunire*, unpardonable even by the king. Nor, 2. can the king pardon, where private juſtice is principally concerned in the proſecution of offenders: "*non poteſt rex gratiam facere cum injuria et damno aliorum*[r]." Therefore in appeals of all kinds (which are the ſuit, not of the king, but of the party injured) the proſecutor may releaſe, but the king cannot pardon [s]. Neither can he pardon a common nuiſance, while it remains unredreſſed, or ſo as to prevent an abatement of it; though afterwards he may remit the fine: becauſe though the proſecution is veſted in the king to avoid multiplicity of ſuits, yet (during it's continuance) this offence favours more of the nature of a *private* injury to each individual in the neighbourhood, than of a [399] *public* wrong [t]. Neither, laſtly, can the king pardon an offence againſt a popular or penal ſtatute, after information brought: for thereby the informer hath acquired a private property in his part of the penalty [v].

THERE is alſo a reſtriction of a peculiar nature, that affects the prerogative of pardoning, in caſe of parliamentary impeachments; *viz.* that the king's pardon cannot be *pleaded* to any ſuch impeachment, ſo as to impede the inquiry, and

[r] 3 Inſt. 236.
[s] *Ibid.* 237.
[t] 2 Hawk. P. C. 391.
[v] 3 Inſt. 338.

ſtop

ſtop the proſecution of great and notorious offenders. Therefore when, in the reign of Charles the ſecond, the earl of Danby was impeached by the houſe of commons of high treaſon, and other miſdemeſnors, and pleaded the king's pardon in bar of the ſame, the commons alleged [u], "that there "was no precedent, that ever any pardon was granted to any "perſon impeached by the commons of high treaſon, or other "high crimes, *depending the impeachment;*" and thereupon reſolved [w], "that the pardon ſo pleaded was illegal and void, "and ought not to be allowed *in bar* of the impeachment of "the commons of England:" for which reſolution they aſſigned [x] this reaſon to the houſe of lords, "that the ſetting "up a pardon to be a *bar* of an impeachment defeats the "whole uſe and effect of impeachments: for ſhould this "point be admitted, or ſtand doubted, it would totally diſcourage the exhibiting any for the future; whereby the "chief inſtitution for the preſervation of the government "would be deſtroyed." Soon after the revolution, the commons renewed the ſame claim, and voted [y], "that a "pardon is not *pleadable in bar* of an impeachment." And, at length, it was enacted by the act of ſettlement, 12 & 13 W. III. c. 2. "that no pardon under the great ſeal of England ſhall be *pleadable* to an impeachment by the commons "in parliament." But, after the impeachment has been ſolemnly heard and determined, it is not underſtood that the
[400] king's royal grace is farther reſtrained or abridged: for, after the impeachment and attainder of the ſix rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's moſt gracious pardon (2).

[u] Com. Journ. 28 Apr. 1679.
[w] *Ibid.* 5 May 1679.
[x] Com. Journ. 26 May 1679.
[y] *Ibid.* 6 June 1689.

(2) The following remarkable record, in which it is both acknowledged by the commons and aſſerted by the king, proves that the king's prerogative to pardon delinquents convicted in impeachments, is as ancient as the conſtitution itſelf.

Item

2. As to the *manner* of pardoning. 1. First, it must be under the *great* seal. A warrant under the privy seal, or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the king's pardon, when obtained in proper form, yet is not of itself a complete irrevocable pardon [z]. 2. Next, it is a general rule, that, wherever it may reasonably be presumed the king is deceived, the pardon is void [a]. Therefore any suppression of truth, or suggestion of falsehood, in a charter of pardon, will vitiate the whole; for the king was misinformed [b]. 3. General words

[z] 5 St. Tr. 166. 173. [a] 2 Hawk. P. C. 383. [b] 3 Inst. 238.

Item prie la commune a nostre dit seigneur le roi que nul pardon soit grante a nul'y persone, petit ne grande, q'ont este de son counseil et serementez, et sont empeschez en cest present parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, tenemenz, biens, ou chateux, lesqueux sont ou serront trovez en aucun defaut encontre leur ligeance, et la tenure de leur dit serement; mais q'ils ne serront jammes conseillers ne officers du roi, mais en tout oustez de la courte le roi et de conseil as touz jours. Et sur ceo soit en present parlement fait estatut s'il plest au roi, et de touz autres en temps a venir en cas semblables, pur profit du roi et de roialme.

Responsio.—Le roi ent fra sa volente, come mieltz lui semblera. Rot. Parl. 50 Ed. III. n. 188.

After the lords have delivered their sentence of guilty, the commons have the power of pardoning the impeached convict, by refusing to demand judgment against him, for no judgment can be pronounced by the lords till it is demanded by the commons. Lord Macclesfield was found guilty without a dissenting voice in the house of lords; but when the question was afterwards proposed in the house of commons, *that this house will demand judgment of the lords against Thomas earl of Macclesfield*, it occasioned a warm debate, but (the previous question being first moved) it was carried in the affirmative by a majority of 136 voices against 65. *Comm. Journ.* 27 May 1725. 6 *H. St. Tr.* 762. In the impeachment of Warren Hastings, esq. it was decided, after much serious and learned investigation and discussion, by a very great majority in each house of parliament, that an impeachment was not abated by a dissolution of the parliament, though almost all the legal characters of each house voted in the minorities.

have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony; (for it is presumed the king knew not of those proceedings;) but the conviction or attainder must be particularly mentioned [c]; and a pardon of felonies will not include piracy [d]; for that is no felony punishable at the common law. 4. It is also enacted by statute 13 Ric. II. st. 2. c. 1. that no pardon for treason, murder, or rape shall be allowed, unless the offence be particularly specified therein; and particularly in murder it shall be expressed, whether it was committed by lying in wait, assault, or malice prepense. Upon which sir Edward Coke observes [e], that it was not the intention of the parliament that the king should ever pardon murder under these aggravations; and therefore they prudently laid the pardon under these restrictions, because they did not conceive it possible that the king would ever excuse an offence by name, which was attended with such high aggravations. And it is remarkable enough, that there is no precedent of a pardon in the register for any other homicide, than that
[401] which happens *se defendendo* or *per infortunium*; to which two species the king's pardon was expressly confined by the statutes 2 Edw. III. c. 2. and 14 Edw. III. c. 15. which declare that no pardon of homicide shall be granted, but only where the king may do it *by the oath of his crown*; that is to say, where a man slayeth another in his own defence, or by misfortune. But the statute of Richard the second, before-mentioned, enlarges by implication the royal power: provided the king is not deceived in the intended object of his mercy. And therefore pardons of murder were always granted with a *non obstante* of the statute of king Richard, till the time of the revolution; when the doctrine of *non obstante*'s ceasing, it was doubted whether murder could be pardoned generally: but it was determined by the court of king's bench [f], that the king may pardon on an indictment of murder, as well as a subject may discharge an appeal. Under these and a few other restrictions, it is a general rule,

[c] 2 Hawk. P. C. 383.
[d] 1 Hawk. P. C. 99.
[e] 3 Inst. 236.
[f] Salk. 499.

that

that a pardon ſhall be taken moſt beneficially *for* the ſubject, and moſt ſtrongly againſt the king.

A PARDON may alſo be *conditional*: that is, the king may extend his mercy upon what terms he pleaſes; and may annex to his bounty a condition either precedent or ſubſequent, on the performance whereof the validity of the pardon will depend: and this by the common law [g]. Which prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labour for a ſtated time, or of tranſportation to ſome foreign country for life, or for a term of years; ſuch tranſportation or baniſhment [h] being allowable and warranted by the *habeas corpus* act, 31 Car. II. c. 2. § 14. and both the impriſonment and tranſportation rendered more eaſy and effectual by ſtatutes 8 Geo. III. c. 15. and 19 Geo. III. c. 74 (3).

3. WITH regard to the manner of *allowing* pardons; we may obſerve, that a pardon by act of parliament is more beneficial than by the king's charter; for a man is not bound [402] to plead it, but the court muſt *ex officio* take notice of it [i]; neither can he loſe the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon [k]. The king's charter of pardon muſt be ſpecially pleaded, and that at a proper time: for if a man is indicted, and has a pardon in his pocket, and afterwards puts himſelf upon his trial by pleading the general iſſue, he has waived the benefit of ſuch pardon [l]. But, if a man avails himſelf thereof, as ſoon as by courſe of law he may, a pardon may either be pleaded upon arraignment, or in arreſt of judgment, or in the preſent ſtage of proceedings, in bar of execution. Antiently, by ſtatute

[g] 2 Hawk. P. C. 394.

[h] Tranſportation is ſaid (Bar. 252.) to have been firſt inflicted as a puniſhment, by ſtatute 39 Eliz. c. 4.

[i] Foſt. 43.

[k] 2 Hawk. P. C. 397.

[l] *Ibid.* 396.

(3) And ſtill farther by 24 Geo. III. c. 56. and 31 Geo. III. c. 46.

10 Edw. III. c. 2. no pardon of felony could be allowed, unleſs the party found ſureties for the good behaviour before the ſheriff and coroners of the county [m]. But that ſtatute is repealed by the ſtatute 5 & 6 W. & M. c. 13. which, inſtead thereof gives the judges of the court a diſcretionary power to bind the criminal, pleading ſuch pardon, to his good behaviour, with two ſureties, for any term not exceeding ſeven years.

4. LASTLY, the *effect* of ſuch pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not ſo much to reſtore his former, as to give him a new, credit and capacity. But nothing can reſtore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and tranſcendent power of parliament. Yet if a perſon attainted receives the king's pardon, and afterwards hath a ſon, that ſon may be heir to his father, becauſe the father being made a new man, might tranſmit new inheritable blood; though, had he been born before the pardon, he could never have inherited at all [n] (4).

[m] Salk 499. [n] See Vol. II. pag. 254.

(4) A ſon born after the attainder may inherit if he has no elder brother living born before the attainder, otherwiſe the land will eſcheat *pro defectu haeredis*. 1 *H. P. C.* 358.

CHAPTER THE THIRTY-SECOND.

OF EXECUTION.

THERE now remains nothing to ſpeak of, but *execution*; the completion of human puniſhment. And this, in all caſes, as well capital as otherwiſe, muſt be performed by the legal officer, the ſheriff or his deputy; whoſe warrant for ſo doing was antiently by precept under the hand and ſeal of the judge, as it is ſtill practiſed in the court of the lord high ſteward, upon the execution of a peer [a]: though, in the court of the peers in parliament, it is done by writ from the king [b]. Afterwards it was eſtabliſhed [c], that, in caſe of life, the judge may command execution to be done without any writ. And now the uſage is, for the judge to ſign the calendar, or liſt of all the priſoners' names, with their ſeparate judgments in the margin, which is left with the ſheriff. As, for a capital felony, it is written oppoſite to the priſoner's name "let him be hanged by the neck;" formerly, in the days of Latin and abbreviation [d], "*ſuſ. per col.*" for "*ſuſpendatur per collum.*" And this is the only warrant that the ſheriff has for ſo material an act as taking away the life of another [e]. It may certainly afford matter of ſpeculation, that in civil cauſes there ſhould be ſuch a variety of writs of execution to recover a trifling debt, iſſued in the king's name, and under the ſeal of the court, without which the ſheriff cannot legally ſtir one ſtep; and yet that the execution of a [404]

[a] 2 Hal. P. C. 409.
[b] See Append. § 5.
[c] Finch. L. 478.
[d] Staundf. P. C. 182.
[e] 5 Mod. 22.

man, the moſt important and terrible taſk of any, ſhould depend upon a marginal note (1).

THE ſheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is alſo left at large. In London indeed a more ſolemn and becoming exactneſs is uſed, both as to the warrant of execution, and the time of executing thereof: for the recorder, after reporting to the king in perſon the caſe of the ſeveral priſoners, and receiving his royal pleaſure, that the law muſt take it's courſe, iſſues his warrant to the ſheriffs; directing them

(1) Though it be true that a marginal note of a calendar, ſigned by the judge, is the only warrant that the ſheriff has for the execution of a convict, yet it is made with more caution and ſolemnity than is repreſented by the learned commentator. At the end of the aſſizes the clerk of aſſize makes out in writing four liſts of all the priſoners, with ſeparate columns, containing their crimes, verdicts, and ſentences, leaving a blank column, in which, if the judge has reaſon to vary the courſe of the law, he writes oppoſite the names of the capital convicts, *to be reprieved, reſpited, tranſported*, &c. Theſe four calendars, being firſt carefully compared together by the judge and the clerk of aſſize, are ſigned by them, and one is given to the ſheriff, one to the gaoler, and the judge and the clerk of aſſize each keep another. If the ſheriff receives afterwards no ſpecial order from the judge, he executes the judgment of the law in the uſual manner, agreeably to the directions of his calendar. In every county this important ſubject is ſettled with great deliberation by the judge and the clerk of aſſize, before the judge leaves the aſſize-town; but probably in different counties, with ſome ſlight variation, as in Lancaſhire, no calendar is left with the gaoler, but one is ſent to the ſecretary of ſtate.

If the judge thinks it proper to reprieve a capital convict, he ſends a memorial or certificate *to the king's moſt excellent majeſty*, directed to the ſecretary of ſtate's office, ſtating that, from favourable circumſtances appearing at the trial, he recommends him to his majeſty's mercy, and to a pardon upon condition of tranſportation or ſome ſlight puniſhment. This recommendation is always attended to.

to

to do execution on the day and at the place assigned [f]. And, in the court of king's bench, if the prisoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution; either specifying the time and place [g], or leaving it to the discretion of the sheriff [h]. And, throughout the kingdom, by statute 25 Geo. II. c. 37. it is enacted that, in case of murder, the judge shall in his sentence direct execution to be performed on the next day but one after sentence passed [i]. But, otherwise, the time and place of execution are by law no part of the judgment [k]. It has been well observed [l], that it is of great importance, that the punishment should follow the crime as early as possible; that the prospect of gratification or advantage, which tempts a man to commit the crime, should instantly awake the attendant idea of punishment. Delay of execution serves only to separate these ideas: and then the execution itself affects the minds of the spectators rather as a terrible sight, than as the necessary consequence of transgression.

THE sheriff cannot alter the manner of the execution by substituting one death for another, without being guilty of felony himself, as has been formerly said [m]. It is held also by sir Edward Coke [n] and sir Matthew Hale [o], that even the [405] king cannot change the punishment of the law, by altering the hanging or burning into beheading; though, when beheading is part of the sentence, the king may remit the rest. And, notwithstanding some examples to the contrary, sir Edward Coke stoutly maintains, that "*judicandum est legibus, non exemplis.*" But others have thought [p], and more justly, that this prerogative, being founded in mercy and immemorially exercised by the crown, is part of the common law. For hitherto, in every instance, all these exchanges

[f] See Append. § 4.
[g] St. Trials. VI. 332. Fost. 43.
[h] See Append. § 3.
[i] See pag. 202.
[k] So held by the twelve judges, Mich. 10. Geo. III.
[l] Beccar. ch. 19.
[m] See pag. 179.
[n] 3 Inst. 52.
[o] 2 Hal. P. C. 412.
[p] Fost. 270. F. N. B. 244. h. 19 Rym. *Feed.* 284.

have been for more merciful kinds of death; and how far this may alſo fall within the king's power of granting conditional pardons, (*viz.* by remitting a ſevere kind of death, on condition that the criminal ſubmits to a milder,) is a matter that may bear conſideration. It is obſervable, that when lord Stafford was executed for the popiſh plot in the reign of king Charles the ſecond, the then ſheriffs of London, having received the king's writ for beheading him, petitioned the houſe of lords, for a command or order from their lordſhips, how the ſaid judgment ſhould be executed: for, he being proſecuted by impreachment, they entertained a notion (which is ſaid to have been countenanced by lord Ruſſel) that the king could not pardon any part of the ſentence [q]. The lords reſolved [r], that the ſcruples of the ſheriffs were unneceſſary, and declared, that the king's writ ought to be obeyed. Diſappointed of raiſing a flame in that aſſembly, they immediately ſignified [s] to the houſe of commons by one of the members, that they were not ſatisfied as to the power of the ſaid writ. That houſe took two days to conſider of it; and then [t] ſullenly reſolved, that the houſe was *content* that the ſheriff do execute lord Stafford by ſevering his head from his body. It is further related, that when afterwards the ſame lord Ruſſel was condemned for high treaſon upon indictment, the king while he remitted the ignominious part of
[406] the ſentence, obſerved, "that his lordſhip would now find "he was poſſeſſed of that prerogative, which in the caſe of "lord Stafford he had denied him [u]." One can hardly determine (at this diſtance from thoſe turbulent times) which moſt to diſapprove of, the indecent and ſanguinary zeal of the ſubject, or the cool and cruel ſarcaſm of the ſovereign.

To conclude: it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the ſheriff muſt hang him

[q] 2 Hum. Hiſt. of G. B. 328.
[r] Lords Journ. 21 Dec. 1680.
[s] Com. Journ. 21 Dec. 1680.
[t] *Ibid.* 23 Dec. 1680.
[u] 2 Hume 360.

again.

again [w]. For the former hanging was no execution of the ſentence; and, if a falſe tenderneſs were to be indulged in ſuch caſes, a multitude of colluſions might enſue. Nay, even while abjurations were in force [x], ſuch a criminal, ſo reviving was not allowed to take ſanctuary and abjure the realm; but his fleeing to ſanctuary was held an eſcape in the officer [y].

AND having thus arrived at the *laſt* ſtage of criminal proceedings, or execution, the end and completion of human *puniſhment*, which was the ſixth and laſt head to be conſidered under the diviſion of *public wrongs*, the fourth and laſt object of the laws of England; it may now ſeem high time to put a period to theſe commentaries, which the author is very ſenſible, have already ſwelled to too great a length. But he cannot diſmiſs the ſtudent, for whoſe uſe alone theſe rudiments were originally compiled, without endeavouring to recall to his memory ſome principal outlines of the legal conſtitution of this country; by a ſhort hiſtorical review of the moſt conſiderable revolutions, that have happened in the laws of England, from the earlieſt to the preſent times. And this taſk he will attempt to diſcharge, however imperfectly, in the next or concluding chapter.

[w] 2 Hal. P. C. 412. 2 Hawk. P. C. 463.

[x] See pag. 326.

[y] Fitzh. *Abr. t. corone.* 335. Finch L. 467.

CHAPTER THE THIRTY-THIRD.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS, OF THE LAWS OF ENGLAND.

BEFORE we enter on the ſubject of this chapter, in which I propoſe, by way of ſupplement to the whole, to attempt an hiſtorical review of the moſt remarkable changes and alterations, that have happened in the laws of England, I muſt firſt of all remind the ſtudent, that the riſe and progreſs of many principal points and doctrines have been already pointed out in the courſe of theſe commentaries, under their reſpective diviſions: theſe having therefore been particularly diſcuſſed already, it cannot be expected that I ſhould re-examine them with any degree of minuteneſs; which would be a moſt tedious undertaking. What I therefore at preſent propoſe, is only to mark out ſome outlines of an Engliſh juridical hiſtory, by taking a chronological view of the ſtate of our laws, and their ſucceſſive mutations at different periods of time.

THE ſeveral periods, under which I ſhall conſider the ſtate of our legal polity, are the following ſix: 1. From the earlieſt times to the Norman conqueſt: 2. From the Norman conqueſt to the reign of king Edward the firſt: 3. From thence to the reformation: 4. From the reformation to the
[408] reſtoration of king Charles the ſecond: 5. From thence to the revolution in 1688: 6. From the revolution to the preſent time.

I. AND,

I. AND, firſt, with regard to the antient Britons, the *aborigines* of our iſland, we have ſo little handed down to us concerning them with any tolerable certainty, that our inquiries here muſt needs be very fruitleſs and defective. However, from Cæſar's account of the tenets and diſcipline of the antient Druids in Gaul, in whom centered all the learning of theſe weſtern parts, and who were, as he tells us, ſent over to Britain, (that is, to the iſland of Mona or Angleſey,) to be inſtructed; we may collect a few points, which bear a great affinity and reſemblance to ſome of the modern doctrines of our Engliſh law. Particularly, the very notion itſelf of an oral unwritten law, delivered down from age to age, by cuſtom and tradition merely, ſeems derived from the practice of the Druids, who never committed any of their inſtructions to writing: poſſibly for want of letters; ſince it is remarkable that in all the antiquities, unqueſtionably Britiſh, which the induſtry of the moderns has diſcovered, there is not in any of them the leaſt trace of any character or letter to be found. The partible quality alſo of lands, by the cuſtom of gavelkind, which ſtill obtains in many parts of England, and did univerſally over Wales till the reign of Henry VIII. is undoubtedly of Britiſh original. So likewiſe is the antient diviſion of the goods of an inteſtate between his widow and children, or next of kin: which has ſince been revived by the ſtatute of diſtributions. And we may alſo remember an inſtance of a ſlighter nature mentioned in the preſent volume, where the ſame cuſtom has continued from Cæſar's time to the preſent; that of burning a woman guilty of the crime of petit treaſon by killing her huſband (1).

THE great variety of nations, that ſucceſſively broke in upon and deſtroyed both the Britiſh inhabitants and conſtitution, the Romans, the Picts, and, after them, the various [409]

(1) But this is now altered by ſtatute 30 Geo. III. c. 48. See ante, p. 204.

clans of Saxons and Danes, must necessarily have caused great confusion and uncertainty in the laws and antiquities of the kingdom; as they were very soon incorporated and blended together, and therefore, we may suppose, mutually communicated to each other their respective usages [a], in regard to the rights of property, and the punishment of crimes. So that it is morally impossible to trace out, with any degree of accuracy, *when* the several mutations of the common law were made, or what was the respective original of those several customs we at present use, by any chemical resolution of them to their first and component principles. We can seldom pronounce, that *this* custom was derived from the Britons; *that* was left behind by the Romans; *this* was a necessary precaution against the Picts; *that* was introduced by the Saxons, discontinued by the Danes, but afterwards restored by the Normans.

WHEREVER this can be done, it is matter of great curiosity, and some use: but this can very rarely be the case; not only from the reason above-mentioned, but also from many others. First, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, suffer by degrees insensible variations in practice [b]: so that, though upon comparison we plainly discern the alteration of the law from what it was five hundred years ago, yet it is impossible to define the precise period in which that alteration accrued, any more than we can discern the changes of the bed of a river, which varies it's shores by continual decreases and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and it's government: which alone, though it had been disturbed by no foreign invasions, would make it impossible to search out the original of it's laws; unless we had as authentic monuments thereof, as the Jews had by the hand of Moses [c]. Thirdly, [410] this uncertainty of the true origin of particular customs must

[a] Hal. Hist. C. L. 62. [b] *Ibid.* 57. [c] *Ibid.* 59.

also

alſo in part have ariſen from the means, whereby chriſtianity was propagated among our Saxon anceſtors in this iſland; by learned foreigners brought over from Rome and other countries; who undoubtedly carried with them many of their own national cuſtoms; and probably prevailed upon the ſtate to abrogate ſuch uſages as were inconſiſtent with our holy religion, and to introduce many others that were more comformable thereto. And this perhaps may have partly been the cauſe, that we find not only ſome rules of the moſaical, but alſo of the imperial and pontifical laws, blended and adopted into our own ſyſtem.

A FARTHER reaſon may alſo be given for the great variety, and of courſe the uncertain original, of our antient eſtabliſhed cuſtoms; even after the Saxon government was firmly eſtabliſhed in this iſland: *viz.* the ſubdiviſion of the kingdom into an heptarchy, conſiſting of ſeven independent kingdoms, peopled and governed by different clans and colonies. This muſt neceſſarily create an infinite diverſity of laws: even though all thoſe colonies, of Jutes, Angles, Anglo-Saxons, and the like, originally ſprung from the ſame mother-country, the great northern hive; which poured forth it's warlike progeny, and ſwarmed all over Europe, in the ſixth and ſeventh centuries. This multiplicity of laws will neceſſarily be the caſe in ſome degree, where any kingdom is cantoned out into provincial eſtabliſhments; and not under one common diſpenſation of laws, though under the ſame ſovereign power. Much more will it happen where ſeven unconnected ſtates are to form their own conſtitution and ſuperſtructure of government, though they all begin to build upon the ſame or ſimilar foundations.

WHEN therefore the Weſt Saxons had ſwallowed up all the reſt, and king Alfred ſucceeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a moſt great and neceſſary work, which he is ſaid to have executed in as maſterly a manner: no leſs than to new model the conſtitution; [411]

to

to rebuild it on a plan that ſhould endure for ages; and, out of it's old diſcordant materials, which were heaped upon each other in a vaſt and rude irregularity, to form one uniform and well-connected whole. This he effected, by reducing the whole kingdom under one regular and gradual ſubordination of government, wherein each man was anſwerable to his immediate ſuperior for his own conduct and that of his neareſt neighbours: for to him we owe that maſterpiece of judicial polity, the ſubdiviſion of England into tithings and hundreds, if not into counties; all under the influence and adminiſtration of one ſupreme magiſtrate, the king; in whom as in a general reſervoir, all the executive authority of the law was lodged, and from whom juſtice was diſperſed to every part of the nation by diſtinct, yet communicating, ducts and channels; which wiſe inſtitution has been preſerved for near a thouſand years unchanged, from Alfred's to the preſent time. He alſo, like another Theodoſius, collected the various cuſtoms that he found diſperſed in the kingdom, and reduced and digeſted them into one uniform ſyſtem or code of laws, in his dom-bec, or *liber judicialis*. This he compiled for the uſe of the court-baron, hundred, and county-court, the court-leet, and ſheriff's tourn; tribunals, which he eſtabliſhed, for the trial of all cauſes civil and criminal, in the very diſtricts wherein the complaint aroſe: all of them ſubject however to be inſpected, controlled, and kept within the bounds of the univerſal or common law, by the king's own courts; which were then itinerant, being kept in the king's palace, and removing with his houſhold in thoſe royal progreſſes, which he continually made from one end of the kingdom to the other.

THE Daniſh invaſion and conqueſt, which introduced new foreign cuſtoms, was a ſevere blow to this noble fabric: but a plan, ſo excellently concerted, could never be long thrown aſide. So that, upon the expulſion of theſe intruders, the Engliſh returned to their antient law; retaining however ſome few of the cuſtoms of their late viſitants; which went [412] under the name of *Dane-Lage*: as the code compiled by Alfred

Alfred was called the *Weſt Saxon-Lage*; and the local conſtitutions of the antient kingdom of Mercia, which obtained in the counties neareſt to Wales, and probably abounded with many Britiſh cuſtoms, were called the *Mercen-Lage*. And theſe three laws were, about the beginning of the eleventh century, in uſe in different counties of the realm: the provincial polity of counties, and their ſubdiviſions, having never been altered or diſcontinued through all the ſhocks and mutations of government, from the time of it's firſt inſtitution; though the laws and cuſtoms therein uſed, have (as we ſhall ſee) often ſuffered conſiderable changes.

FOR king Edgar, (who beſides his military merit, as founder of the Engliſh navy, was alſo a moſt excellent civil governor,) obſerving the ill effects of three diſtinct bodies of laws, prevailing at once in ſeparate parts of his dominions, projected and begun what his grandſon king Edward the confeſſor afterwards completed; *viz.* one uniform digeſt or body of laws to be obſerved throughout the whole kingdom: being probably no more than a revival of king Alfred's code, with ſome improvements ſuggeſted by neceſſity and experience; particularly the incorporating ſome of the Britiſh or rather Mercian cuſtoms, and alſo ſuch of the Daniſh as were reaſonable and approved, into the *Weſt-Saxon-Lage*, which was ſtill the groundwork of the whole. And this appears to be the beſt ſupported and moſt plauſible conjecture (for certainty is not to be expected) of the riſe and original of that admirable ſyſtem of maxims and unwritten cuſtoms, which is now known by the name of the *common* law, as extending it's authority univerſally over all the realm; and which is doubtleſs of Saxon parentage.

AMONG the moſt remarkable of the Saxon laws we may reckon, 1. The conſtitution of parliaments, or rather, general aſſemblies of the principal and wiſeſt men in the nation: the *wittena-gemote*, or *commune conſilium* of the antient Germans; which was not yet reduced to the forms and diſtinctions of our modern parliament: without whoſe concurrence, however, [413]

however, no new law could be made, or old one altered. 2. The election of their magiſtrates by the people; originally even that of their kings, till dear-bought experience evinced the convenience and neceſſity of eſtabliſhing an hereditary ſucceſſion to the crown. But that of all ſubordinate magiſtrates, their military officers or heretochs, their ſheriffs, their conſervators of their peace, their coroners, their port-reeves, (ſince changed into mayors and bailiffs,) and even their tything-men and borſholders at the leet, continued, ſome till the Norman conqueſt, others for two centuries after, and ſome remain to this day. 3. The deſcent of the crown, when once a royal family was eſtabliſhed, upon nearly the ſame hereditary principles upon which it has ever ſince continued: only that, perhaps, in caſe of minority, the next of kin of full age would aſcend the throne, as king, and not as protector; though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital puniſhments for the firſt offence: even the moſt notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage; to which our benefit of clergy has now in ſome meaſure ſucceeded. 5. The prevalence of certain cuſtoms, as heriots and military ſervices in proportion to every man's land, which much reſembled the feodal conſtitution; but yet were exempt from all it's rigorous hardſhips: and which may be well enough accounted for, by ſuppoſing them to be brought from the continent by the firſt Saxon invaders, in the primitive moderation and ſimplicity of the feodal law; before it got into the hands of the Norman juriſts, who extracted the moſt ſlaviſh doctrines and oppreſſive conſequences out of what was originally intended as a law of liberty. 6. That their eſtates were liable to forfeiture for treaſon, but that the doctrine of eſcheats and corruption of blood for felony, or any other cauſe, was utterly unknown amongſt them. 7. The deſcent of their lands to all the males equally, without any right of primogeniture; a cuſtom, which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman conqueſt: though really inconvenient, and more eſpecially

[414]

deſtructive

deſtructive to antient families; which are in monarchies neceſſary to be ſupported, in order to form and keep up a nobility, or intermediate ſtate between the prince and the common people. 8. The courts of juſtice conſiſted principally of the county courts, and in caſes of weight or nicety the king's court held before himſelf in perſon, at the time of his parliaments; which were uſually holden in different places, according as he kept the three great feſtivals of chriſtmas, eaſter, and whitſuntide. An inſtitution which was adopted by king Alonſo VII. of Caſtile, about a century after the conqueſt: who at the ſame three great feaſts was wont to aſſemble his nobility and prelates in his court; who there heard and decided all controverſies, and then, having received his inſtructions, departed home [d]. Theſe county courts however differed from the modern ones, in that the eccleſiaſtical and civil juriſdiction were blended together, the biſhop and the ealdorman or ſheriff ſitting in the ſame county court; and alſo that the deciſions and proceedings therein were much more ſimple and unembarraſſed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials, among a people who had a very ſtrong tincture of ſuperſtition, were permitted to be by *ordeal*, by the *corſned* or morſel of execration, or by *wager of law* with compurgators, if the party choſe it; but frequently they were alſo by *jury*: for, whether or no their juries conſiſted preciſely of twelve men, or were bound to a ſtrict unanimity; yet the general conſtitution of this admirable criterion of truth, and moſt important guardian both of public and private liberty, we owe to our Saxon anceſtors. Thus ſtood the general frame of our polity at the time of the Norman invaſion; when the ſecond period of our legal hiſtory commences.

II. THIS remarkable event wrought as great an alteration in our laws, as it did in our antient line of kings: and though the alteration of the former was effected rather by the

[d] Mod. Un. Hiſt. xx. 114.

conſent of the people, than any right of conqueſt, yet that conſent ſeems to have been partly extorted by fear, and partly given without any apprehenſion of the conſequences which afterwards enſued.

1. AMONG the firſt of theſe alterations we may reckon the ſeparation of the eccleſiaſtical courts from the civil: effected in order to ingratiate the new king with the popiſh clergy, who for ſome time before had been endeavouring all over Europe to exempt themſelves from the ſecular power; and whoſe demands the conqueror, like a politic prince, thought it prudent to comply with, by reaſon that their reputed ſanctity had a great influence over the minds of the people; and becauſe all the little learning of the times was engroſſed into their hands, which made them neceſſary men, and by all means to be gained over to his intereſts. And this was the more eaſily effected, becauſe, the diſpoſal of all the epiſcopal ſees being then in the breaſt of the king, he had taken care to fill them with Italian and Norman prelates.

2. ANOTHER violent alteration of the Engliſh conſtitution conſiſted in the depopulation of whole countries, for the purpoſes of the king's royal diverſion; and ſubjecting both them, and all the antient foreſts of the kingdom, to the unreaſonable ſeverities of foreſt laws imported from the continent, whereby the ſlaughter of a beaſt was made almoſt as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chaſe the king's deer, yet he might ſtart any game, purſue, and kill it, upon his own eſtate. But the rigour of theſe new conſtitutions veſted the ſole property of all the game in England in the king alone (z); and no man was entitled to diſturb any fowl of the air, or any beaſt of the field, of ſuch kinds as were ſpecially reſerved for the royal amuſement of the ſovereign, without expreſs licence from the king,

(z) See this controverted by the editor in the 2d vol. p. 419. n. 10.

by a grant of a chaſe or free-warren: and thoſe franchiſes were granted as much with a view to preſerve the breed of animals, as to indulge the ſubject. From a ſimilar principal to which, though the foreſt laws are now mitigated, and by degrees grown entirely obſolete, yet from this root has ſprung a baſ- [416]
tard ſlip, known by the name of the game law, now arrived to and wantoning in it's higheſt vigour: both founded upon the ſame unreaſonable notions of permanent property in wild creatures; and both productive of the ſame tyranny to the commons: but with this difference; that the foreſt laws eſtabliſhed only one mighty hunter throughout the land, the game laws have raiſed a little Nimrod in every manor. And in one reſpect the antient law was much leſs unreaſonable than the modern: for the king's grantee of a chaſe or free-warren might kill game in every part of his franchiſe; but now, though a freeholder of leſs than 100 *l.* a year is forbidden to kill a partridge upon his own eſtate, yet nobody elſe (not even the lord of the manor, unleſs he hath a grant of free-warren) can do it without committing a treſpaſs, and ſubjecting himſelf to an action.

3. A THIRD alteration in the Engliſh laws was by narrowing the remedial influence of the county courts, the great ſeats of Saxon juſtice, and extending the *original* juriſdiction of the king's juſticiars to all kinds of cauſes, ariſing in all parts of the kingdom. To this end the *aula regis*, with all it's multifarious authority, was erected; and a capital juſticiary appointed, with powers ſo large and boundleſs, that he became at length a tyrant to the people, and formidable to the crown itſelf. The conſtitution of this court, and the judges themſelves who preſided there, were fetched from the duchy of Normandy: and the conſequence naturally was, the ordaining that all proceedings in the king's courts ſhould be carried on in the Norman, inſtead of the Engliſh language. A proviſion the more neceſſary, becauſe none of his Norman juſticiars underſtood Engliſh; but as evident a badge of ſlavery as ever was impoſed upon a conquered people. This laſted till king Edward the third obtained a double victory,

over the armies of France in their own country, and their language in our courts here at home. But there was one miſchief too deeply rooted thereby, and which this caution of
[417] king Edward came too late to eradicate. Inſtead of the plain and eaſy method of determining ſuits in the county courts, the chicanes and ſubtilties of Norman juriſprudence had taken poſſeſſion of the king's courts, to which every cauſe of conſequence was drawn. Indeed that age, and thoſe immediately ſucceeding it, were the aera of refinement and ſubtilty. There is an active principle in the human ſoul, that will ever be exerting it's faculties to the utmoſt ſtretch, in whatever employment, by the accidents of time and place, the general plan of education, or the cuſtoms and manners of the age and country, it may happen to find itſelf engaged. The northern conquerors of Europe were then emerging from the groſſeſt ignorance in point of literature; and thoſe, who had leiſure to cultivate it's progreſs, were ſuch only as were cloiſtered in monaſteries, the reſt being all ſoldiers or peaſants. And, unfortunately, the firſt rudiments of ſcience which they imbibed were thoſe of Ariſtotle's philoſophy, conveyed through the medium of his Arabian commentators; which were brought from the eaſt by the Saracens into Paleſtine and Spain, and tranſlated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a riſing ſtate, were thoſe of the nobleſt kind; the eſtabliſhment of religion, and the regulations of civil polity, yet having only ſuch tools to work with, their execution was trifling and flimſy. Both the divinity and the law of thoſe times were therefore frittered into logical diſtinctions, and drawn out into metaphyſical ſubtilties, with a ſkill moſt amazingly artificial; but which ſerves no other purpoſe, than to ſhew the vaſt powers of the human intellect, however vainly or prepoſterouſly employed. Hence law in particular, which (being intended for univerſal reception) ought to be a plain rule of action, became a ſcience of the greateſt intricacy; eſpecially when blended with the new refinements engrafted upon feodal property: which refinements were from time to time gradually introduced by the Norman practitioners,

ers, with a view to ſuperſede (as they did in great meaſure) the more homely, but more intelligible, maxims of diſtributive juſtice among the Saxons. And, to ſay the truth, theſe ſcholaſtic reformers have tranſmitted their dialect and fineſſes [418] to poſterity, ſo interwoven in the body of our legal polity, that they cannot now be taken out without a manifeſt injury to the ſubſtance. Statute after ſtatute has in later times been made, to pare off theſe troubleſome excreſcences, and reſtore the common law to it's priſtine ſimplicity and vigour; and the endeavour has greatly ſucceeded: but ſtill the ſcars are deep and viſible; and the liberality of our modern courts of juſtice is frequently obliged to have recourſe to unaccountable fictions and circuities, in order to recover that equitable and ſubſtantial juſtice, which for a long time was totally buried under the narrow rules and fanciful niceties of metaphyſical and Norman juriſprudence.

4. A FOURTH innovation was the introduction of the trial by combat, for the deciſion of all civil and criminal queſtions of fact in the laſt reſort. This was the immemorial practice of all the northern nations; but firſt reduced to regular and ſtated forms among the Burgundi, about the cloſe of the fifth century: and from them it paſſed to other nations, particularly the Franks and the Normans; which laſt had the honour to eſtabliſh it here, though clearly an unchriſtian, as well as moſt uncertain, method of trial. But it was a ſufficient recommendation of it to the conqueror and his warlike countrymen, that it was the uſage of their native duchy of Normandy.

5. BUT the laſt and moſt important alteration, both in our civil and military polity, was the engrafting on all landed eſtates, a few only excepted, the fiction of feodal tenure; which drew after it a numerous and oppreſſive train of ſervile fruits and appendages; aids, reliefs, primer ſeiſins, wardſhips, marriages, eſcheats, and fines for alienation; the genuine conſequences of the maxim then adopted, that all the lands in England were derived from, and holden, mediately or immediately, of the crown.

THE nation at this period seems to have groaned under as absolute a slavery, as was in the power of a warlike, an am-
[419] bitious, and a politic prince to create. The consciences of men were enslaved by four ecclesiastics, devoted to a foreign power, and unconnected with the civil state under which they lived: who now imported from Rome for the first time the whole *farrago* of superstitious novelties, which had been engendered by the blindness and corruption of the times, between the first mission of Augustin the monk, and the Norman conquest; such as transubstantiation, purgatory, communion in one kind, and the worship of saints and images; not forgetting the universal supremacy and dogmatical infallibility of the holy see. The laws too, as well as the prayers, were administered in an unknown tongue. The antient trial by jury gave way to the impious decision by battel. The forest laws totally restrained all rural pleasures and manly recreations. And in cities and towns the case was no better; all company being obliged to disperse, and fire and candle to be extinguished, by eight at night, at the sound of the melancholy *curfeu*. The ultimate property of all lands, and a considerable share of the present profits, were vested in the king, or by him granted out to his Norman favourites; who, by a gradual progression of slavery, were absolute vassals to the crown, and as absolute tyrants to the commons. Unheard-of forfeitures, talliages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in pursuance of the new system of tenure. And, to crown all, as a consequence of the tenure by knight-service, the king had always ready at his command an army of sixty-thousand knights or *milites*: who were bound, upon pain of confiscating their estates, to attend him in time of invasion, or to quell any domestic insurrection. Trade, or foreign merchandise, such as it then was, was carried on by the Jews and Lombards; and the very name of an English fleet, which king Edgar had rendered so formidable, was utterly unknown to Europe: the nation consisting wholly of the clergy, who were also the lawyers; the barons, or great lords of the land; the knights or soldiery, who were the subordinate landholders; and the burghers,

burghers, or inferior tradesmen, who from their insignificancy happily retained, in their socage and burgage tenure, some points of their antient freedom. All the rest were villeins or bondmen. [420]

FROM so complete and well-concerted a scheme of servility, it has been the work of generations for our ancestors, to redeem themselves and their posterity into that state of liberty, which we now enjoy: and which therefore is not to be looked upon as consisting of mere encroachments on the crown, and infringements on the prerogative, as some slavish and narrow minded writers in the last century endeavoured to maintain: but as, in general, a gradual restoration of that antient constitution, whereof our Saxon forefathers had been unjustly deprived, partly by the policy, and partly by the force, of the Norman. How that restoration has, in a long series of years, been step by step effected, I now proceed to inquire.

WILLIAM RUFUS proceeded on his father's plan, and in some points extended it; particularly with regard to the forest laws. But his brother and successor, Henry the first, found it expedient, when first he came to the crown, to ingratiate himself with the people; by restoring (as our monkish historians tell us) the laws of king Edward the confessor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feodal tenures; but reserved the tenures themselves, for the same military purposes that his father introduced them. He also abolished the *curfeu*[e]; for, though it is mentioned in our laws a full century afterwards[f], yet it is rather spoken of as a known *time* of night (so denominated from that abrogated usage) than as a still subsisting custom. There is extant a code of laws in his name, consisting partly of those of the confessor, but with great additions and alterations of his own; and chiefly calculated for the regula-

[e] Spelm. *Cod. LL. W. I.* 288. *Hen. I.* 299. [f] *Stat. Civ. Lond.* 13. Edw. I.

tion of the county courts. It contains some directions as to crimes and their punishments, (that of theft being made capital in his reign,) and a few things relating to estates, particularly as to the descent of lands: which being by the Saxon laws equally to all the sons, by the feodal or Norman to the eldest only, king Henry here moderated the difference; directing the eldest son to have only the principal estate, "*primum patris feudum*," the rest of his estates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of bishops and mitred abbots; reserving however these ensigns of patronage, *congé d' eslire*, custody of the temporalities when vacant, and homage upon their restitution. He lastly united again for a time the civil and ecclesiastical courts, which union was soon dissolved by his Norman clergy: and, upon that final dissolution, the cognizance of testamentary causes seems to have been first given to the ecclesiastical court. The rest remained as in his father's time: from whence we may easily perceive how far short this was of a thorough restitution of king Edward's, or the Saxon, laws.

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THE usurper Stephen, as the manner of usurpers is, promised much at his accession, especially with regard to redressing the grievances of the forest laws, but performed no great matter either in that or in any other point. It is from his reign however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the same time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

BY the time of king Henry the second, if not earlier, the charter of Henry the first seems to have been forgotten: for we find the claim of marriage, ward, and relief, then flourishing in full vigour. The right of primogeniture seems also to have tacitly revived, being found more convenient for the public than the parcelling of estates into a multitude of minute subdivisions. However in this prince's reign much was done to methodize the laws, and reduce them into a regular

gular order; as appears from that excellent treatise of Glanvil: which, though some of it be now antiquated and altered, yet, when compared with the code of Henry the first, it carries a manifest superiority[g]. Throughout his reign also [422] was continued the important struggle, which we have had occasion so often to mention, between the laws of England and Rome; the former supported by the strength of the temporal nobility, when endeavoured to be supplanted in favour of the latter by the popish clergy. Which dispute was kept on foot till the reign of Edward the first: when the laws of England, under the new discipline introduced by that skilful commander, obtained a complete and permanent victory. In the present reign, of Henry the second, there are four things which peculiarly merit the attention of a legal antiquarian: 1. The constitutions of the parliament at Clarendon, *A. D.* 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the secular jurisdiction: though his farther progress was unhappily stopped, by the fatal event of the disputes between him and archbishop Becket. 2. The institution of the office of justices in eyre, *in itinere*; the king having divided the kingdom into six circuits, (a little different from the present,) and commissioned these new created judges to administer justice, and try writs of assize, in the several counties. These remedies are said to have been then first invented: before which all causes were usually terminated in the county courts, according to the Saxon custom; or before the king's justiciaries in the *aula regis*, in pursuance of the Norman regulations. The latter of which tribunals, travelling about with the king's person, occasioned intolerable expense and delay to the suitors; and the former, however proper for little debts and minute actions, where even injustice is better than procrastination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of considerable moment. 3. The introduction and establishment of the grand

[g] Hal. Hist. C. L. 138.

assise,

aſſiſe, or trial by ſpecial kind of jury in a writ of right, at the option of the tenant or defendant, inſtead of the barbarous and Norman trial by battel. 4. To this time muſt alſo be referred the introduction of eſcuage, or pecuniary com-
[423] mutation for perſonal military ſervice; which in proceſs of time was the parent of the antient ſubſidies granted to the crown by parliament, and the land tax of later times.

RICHARD the firſt, a brave and magnanimous prince, was a ſportſman as well as a ſoldier; and therefore enforced the foreſt laws with ſome rigour; which occaſioned many diſcontents among his people: though (according to Matthew Paris) he repealed the penalties of caſtration, loſs of eyes, and cutting off the hands and feet, before inflicted on ſuch as tranſgreſſed in hunting; probably finding that their ſeverity prevented proſecutions. He alſo, when abroad, compoſed a body of naval laws at the iſle of Oleron: which are ſtill extant, and of high authority: for in his time we began again to diſcover, that (as an iſland) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the juſtices in eyre; the king's thoughts being chiefly taken up by the knight errantry of a croiſade againſt the Saracens in the holy land.

IN king John's time, and that of his ſon Henry the third, the rigours of the feodal tenures and the foreſt laws were ſo warmly kept up, that they occaſioned many inſurrections of the barons or principal feudatories: which at laſt had this effect, that firſt king John, and afterwards his ſon, conſented to the two famous charters of Engliſh liberties, *magna carta*, and *carta de foreſta*. Of theſe the latter was well calculated to redreſs many grievances, and encroachments of the crown, in the exertion of foreſt law: and the former confirmed many liberties of the church, and redreſſed many grievances incident to feodal tenures, of no ſmall moment at the time; though now, unleſs conſidered attentively and with this retroſpect, they ſeem but of trifling concern. But,

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beſides theſe feodal proviſions, care was alſo taken therein to protect the ſubject againſt other oppreſſions, then frequently ariſing from unreaſonable amercements, from illegal diſtreſſes or other proceſs for debts or ſervices due to the crown, and [424] from the tyrannical abuſe of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the ſame manner as it ſtill remains; prohibited for the future the grants of excluſive fiſheries; and the erection of new bridges ſo as to oppreſs the neighbourhood. With reſpect to private rights: it eſtabliſhed the teſtamentary power of the ſubject over part of his perſonal eſtate, the reſt being diſtributed among his wife and children; it laid down the law of dower, as it hath continued ever ſince: and prohibited the appeals of women, unleſs for the death of their huſbands. In matters of public police and national concern: it enjoined an uniformity of weights and meaſures; gave new encouragements to commerce, by the protection of merchant ſtrangers; and forbad the alienation of lands in mortmain. With regard to the adminiſtration of juſtice: beſides prohibiting all denials or delays of it, it fixed the court of common pleas at Weſtminſter, that the ſuitors might no longer be haraſſed with following the king's perſon in all his progreſſes; and at the ſame time brought the trial of iſſues home to the very doors of the freeholders, by directing aſſiſes to be taken in the proper counties, and eſtabliſhing annual circuits: it alſo corrected ſome abuſes then incident to the trials by wager of law and of battel; directed the regular awarding of inqueſt for life or member; prohibited the king's inferior miniſters from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwiſe have unjuſtly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of juſtice, the county court, ſheriff's tourn, and court-leet. It confirmed and eſtabliſhed the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, laſtly, (which alone would have merited the title that it bears, of the *great* charter,) it protected every individual of the nation in the free enjoyment of his life, his liberty,

liberty, and his property, unleſs declared to be forfeited by the judgment of his peers or the law of the land (3).

[425] HOWEVER, by means of theſe ſtruggles, the pope in the reign of king John gained a ſtill greater aſcendant here, than he ever had before enjoyed; which continued through the long reign of his ſon Henry the third: in the beginning of whoſe time the old Saxon trial by ordeal was alſo totally aboliſhed. And we may by this time perceive, in Bracton's treatiſe, a ſtill farther improvement in the method and regularity of the common law, eſpecially in the point of pleadings [h]. Nor muſt it be forgotten, that the firſt traces which remain, of the ſeparation of the greater barons from the leſs, in the conſtitution of parliaments, are found in the great charter of king John; though omitted in that of Henry III.: and that, towards the end of the latter of theſe reigns, we find the firſt record of any writ for ſummoning knights, citizens, and burgeſſes to parliament. And here we conclude the ſecond period of our Engliſh legal hiſtory.

III. THE third commences with the reign of Edward the firſt; who hath juſtly been ſtiled our Engliſh Juſtinian. For in his time the law did receive ſo ſudden a perfection, that ſir Matthew Hale does not ſcruple to affirm [i], that more was done in the firſt thirteen years of his reign to ſettle and eſtabliſh the diſtributive juſtice of the kingdom, than in all the ages ſince that time put together.

[h] Hal. Hiſt. C. L. 156. [i] *Ibid.* 158.

(3) The following is the celebrated 29th chapter of *magna charta*, the foundation of the liberty of Engliſhmen:

Nullus liber homo capiatur, vel impriſonetur, aut diſſeiſiatur de libero tenemento ſuo vel libertatibus vel liberis conſuetudinibus ſuis, aut utlagetur, aut exulet, aut aliquo modo deſtruatur, nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus rectum vel juſtitiam.

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IT would be endleſs to enumerate all the particulars of theſe regulations; but the principal may be reduced under the following general heads. 1. He eſtabliſhed, confirmed, and ſettled, the great charter and charter of foreſts. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and eſtabliſhing the bounds of eccleſiaſtical juriſdiction: and by obliging the ordinary, to whom all the goods of inteſtates at that time belonged, to diſcharge the debts of the deceaſed. 3. He defined the limits of the ſeveral temporal courts of the higheſt juriſdiction, thoſe of the king's bench, common pleas, and exchequer; ſo as they might not interfere with each other's proper buſineſs: [426] to do which, they muſt now have recourſe to a fiction, very neceſſary and beneficial in the preſent enlarged ſtate of property. 4. He ſettled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to cauſes of no great amount, according to their primitive inſtitution; though of conſiderably greater, than by the alteration of the value of money they are now permitted to determine. 5. He ſecured the property of the ſubject by aboliſhing all arbitrary taxes and talliages, levied without conſent of the national council. 6. He guarded the common juſtice of the kingdom from abuſes, by giving up the royal prerogative of ſending mandates to interfere in private cauſes. 7. He ſettled the form, ſolemnities, and effect, of fines levied in the court of common pleas; though the thing itſelf was of Saxon original. 8. He firſt eſtabliſhed a repoſitory for the public records of the kingdom; few of which are antienter than the reign of his father, and thoſe were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preſerving the public peace and preventing robberies, eſtabliſhed by the ſtatute of Wincheſter. 10. He ſettled and reformed many abuſes incident to tenures, and removed ſome reſtraints on the alienation of landed property, by the ſtatute of *quia emptores*. 11. He inſtituted a ſpeedier way for the recovery of debts, by granting execution not only upon goods and chattels, but alſo upon lands, by writ of *elegit*; which was

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of ſignal benefit to a trading people: and, upon the ſame commercial ideas, he alſo allowed the charging of lands in a ſtatute merchant, to pay debts contracted in trade, contrary to all feodal principles. 12. He effectually provided for the recovery of advowſons, as temporal rights; in which, before, the law was extremely deficient. 13. He alſo effectually cloſed the great gulph, in which all the landed property of the kingdom was in danger of being ſwallowed, by his re-iterated ſtatutes of mortmain; moſt admirably adapted to meet the frauds that had then been deviſed, though afterwards contrived to be evaded by the invention of uſes.
[427] 14. He eſtabliſhed a new limitation of property by the creation of eſtates tail; concerning the good policy of which, modern times have however entertained a very different opinion. 15. He reduced all Wales to the ſubjection, not only of the crown, but in great meaſure of the laws, of England (which was thoroughly completed in the reign of Henry the eighth); and ſeems to have entertained a deſign of doing the like by Scotland, ſo as to have formed an entire and complete union of the Iſland of Great Britain.

I MIGHT continue this catalogue much farther—but, upon the whole, we may obſerve, that the very ſcheme and model of the adminiſtration of common juſtice between party and party, was entirely ſettled by this king[k]; and has continued nearly the ſame, in all ſucceeding ages, to this day; abating ſome few alterations, which the humour or neceſſity of ſubſequent times hath occaſioned. The forms of writs, by which actions are commenced, were perfected in his reign, and eſtabliſhed as models for poſterity. The pleadings, conſequent upon the writs, were then ſhort, nervous, and perſpicuous; not intricate, verboſe, and formal. The legal treatiſes, written in his time, as Britton, Fleta, Hengam, and the reſt, are, for the moſt part, law at this day: or at leaſt *were* ſo, till the alteration of tenures took place. And, to conclude, it is from this period, from

[k] Hal. Hiſt. C. L. 162.

the

the exact *observation* of *magna carta*, rather than from it's *making* or *renewal*, in the days of his grandfather and father, that the liberty of Engliſhmen began again to rear it's head; though the weight of the military tenures hung heavy upon it for many ages after.

I CANNOT give a better proof of the excellence of his conſtitutions, than that from his time to that of Henry the eighth there happened very few, and thoſe not very conſiderable, alterations in the legal *forms* of proceedings. As to matter of *ſubſtance*: the old Gothic powers of electing the principal ſubordinate magiſtrates, the ſheriffs, and conſervators of the peace, were taken from the people in the reigns [428] of Edward II. and Edward III.; and juſtices of the peace were eſtabliſhed inſtead of the latter. In the reign alſo of Edward the third the parliament is ſuppoſed moſt probably to have aſſumed it's preſent form; by a ſeparation of the commons from the lords. The ſtatute for defining and aſcertaining treaſons was one of the firſt productions of this new-modelled aſſembly; and the tranſlation of the law proceedings from French into Latin another. Much alſo was done, under the auſpices of this magnanimous prince, for eſtabliſhing our domeſtic manufactures; by prohibiting the exportation of Engliſh wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to ſettle here. Nor was the legiſlature inattentive to many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the ſtatute ſtaple; whereby he might the more readily pledge his lands for the ſecurity of his mercantile debts. And, as perſonal property now grew, by the extenſion of trade, to be much more conſiderable than formerly, care was taken, in caſe of inteſtacies, to appoint adminiſtrators particularly nominated by the law; to diſtribute that perſonal property among the creditors and kindred of the deceaſed, which before had been uſually applied, by the officers of the ordinary, to uſes then denominated pious. The ſtatutes alſo of *praemunire*, for effectually

tually depreſſing the civil power of the pope, were the work of this and the ſubſequent reign. And the eſtabliſhment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown poſſeſſions of the monaſteries, added luſtre to the cloſe of the fourteenth century: though the ſeeds of the general reformation, which were thereby firſt ſown in the kingdom, were almoſt overwhelmed by the ſpirit of perſecution, introduced into the laws of the land by the influence of the regular clergy.

FROM this time to that of Henry the ſeventh, the civil wars and diſputed titles to the crown gave no leiſure for farther
[429] juridical improvement: "*nam ſilent leges inter arma.*"—And yet it is to theſe very diſputes that we owe the happy loſs of all the dominions of the crown on the continent of France; which turned the minds of our ſubſequent princes entirely to domeſtic concerns. To theſe likewiſe we owe the method of barring entails by the fiction of *common recoveries*, invented originally by the clergy, to evade the ſtatutes of mortmain, but introduced under Edward the fourth, for the purpoſe of unfettering eſtates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the univerſal eſtabliſhment of *uſes*, another of the clerical inventions.

IN the reign of King Henry the ſeventh, his miniſters (not to ſay the king himſelf) were more induſtrious in hunting out proſecutions upon old and forgotten penal laws, in order to extort money from the ſubject, than in framing any new beneficial regulations. For the diſtinguiſhing character of this reign, was that of amaſſing treaſure in the king's coffers, by every means that could be deviſed: and almoſt every alteration in the laws, however ſalutary or otherwiſe in their future conſequences, had this and this only for their great and immediate object. To this end the court of ſtar-chamber was new-modelled, and armed with powers, the moſt dangerous and unconſtitutional, over the perſons and properties of the

ſubject.

ſubject. Informations were allowed to be received, in lieu of indictments, at the aſſiſes and ſeſſions of the peace, in order to multiply fines and pecuniary penalties. The ſtatute of fines for landed property was craftily and covertly contrived, to facilitate the deſtruction of entails, and make the owners of real eſtates more capable to forfeit as well as to aliene. The benefit of clergy (which ſo often intervened to ſtop attainders and ſave the inheritance) was now allowed only once to lay offenders, who only could have inheritances to loſe. A writ of *capias* was permitted in all actions on the caſe, and the defendant might in conſequence be outlawed: becauſe upon ſuch outlawry his goods became the property of the crown. In ſhort, there is hardly a ſtatute in this reign, introductive of a new law or modifying the old, but what [430] either directly or obliquely tended to the emolument of the exchequer.

IV. THIS brings us to the fourth period of our legal hiſtory, *viz.* the reformation of religion, under Henry the eighth, and his children; which opens an entirely new ſcene in eccleſiaſtical matters; the uſurped power of the pope being now for ever routed and deſtroyed, all his connexions with this iſland cut off, the crown reſtored to it's ſupremacy over ſpiritual men and cauſes, and the patronage of biſhopricks being once more indiſputably veſted in the king. And, had the ſpiritual courts been at this time re-united to the civil, we ſhould have ſeen the old Saxon conſtitution with regard to *eccleſiaſtical* polity completely reſtored.

WITH regard alſo to our *civil* polity, the ſtatute of wills, and the ſtatute of uſes, (both paſſed in the reign of this prince,) made a great alteration as to property: the former by allowing the *deviſe* of real eſtates by will; which before was in general forbidden; the latter, by endeavouring to deſtroy the intricate nicety of *uſes*, though the narrowneſs and pedantry of the courts of common law prevented this ſtatute from having it's full beneficial effect. And thence the courts of equity

aſſumed a juriſdiction, dictated by common juſtice and common ſenſe: which, however arbitrarily exerciſed or productive of jealouſies in it's infancy, has at length been matured into a moſt elegant ſyſtem of rational juriſprudence; the principles of which (notwithſtanding they may differ in forms) are now equally adopted by the courts of both law and equity. From the ſtatute of uſes, and another ſtatute of the ſame antiquity, (which protected eſtates for years from being deſtroyed by the reverſioner,) a remarkable alteration took place in the mode of conveyancing: the antient aſſurance by feoffment and livery upon the land being now very ſeldom practiſed, ſince the more eaſy and more private invention of tranſferring property, by ſecret conveyances to uſes, and long terms of years being now continually created in mortgages
[431] and family ſettlements, which may be moulded to a thouſand uſeful purpoſes by the ingenuity of an able artiſt.

THE farther attacks in this reign upon the immunity of eſtates-tail, which reduced them to little more than the conditional fees at the common law, before the paſſing of the ſtatute *de donis*, the eſtabliſhment of recognizances in the nature of a ſtatute-ſtaple, for facilitating the raiſing of money upon landed ſecurity; and the introduction of the bankrupt laws, as well for the puniſhment of the fraudulent, as the relief of the unfortunate, trader; all theſe were capital alterations of our legal polity, and highly convenient to that character, which the Engliſh began now to re-aſſume, of a great commercial people. The incorporation of Wales with England, and the more uniform adminiſtration of juſtice, by deſtroying ſome counties palatine, and abridging the unreaſonable privileges of ſuch as remained, added dignity and ſtrength to the monarchy: and, together with the numerous improvements before obſerved upon, and the redreſs of many grievances and oppreſſions which had been introduced by his father, will ever make the adminiſtration of Henry VIII. a very diſtinguiſhed æra in the annals of juridical hiſtory.

IT muſt be however remarked, that (particularly in his later years) the royal prerogative was then ſtrained to a very tyrannical and oppreſſive height; and, what was the worſt circumſtance, it's encroachments were eſtabliſhed by law, under the ſanction of thoſe puſillanimous parliaments, one of which to it's eternal diſgrace paſſed a ſtatute, whereby it was enacted that the king's proclamations ſhould have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-fangled treaſons, which were ſlightly touched upon in a former chapter[1]. Happily for the nation, this arbitrary reign was ſucceeded by the minority of an amiable prince; during the ſhort ſunſhine of which, great part of theſe extravagant laws were repealed. And, to do juſtice to the ſhorter reign of queen Mary, many ſalutary and popular laws, in civil matters, were made [432] under her adminiſtration; perhaps the better to reconcile the people to the bloody meaſures which ſhe was induced to purſue, for the re-eſtabliſhment of religious ſlavery: the well-concerted ſchemes for effecting which, were (through the providence of God) defeated by the ſeaſonable acceſſion of queen Elizabeth.

THE religious liberties of the nation being, by that happy event, eſtabliſhed (we truſt) on an eternal baſis; (though obliged in their infancy to be guarded, againſt papiſts and other non-conformiſts, by laws of too ſanguinary a nature,) the foreſt laws having fallen into diſuſe; and the adminiſtration of civil rights in the courts of juſtice being carried on in a regular courſe, according to the wiſe inſtitutions of king Edward the firſt, without any material innovations; all the principal grievances introduced by the Norman conqueſt ſeem to have been gradually ſhaken off, and our Saxon conſtitution reſtored, with conſiderable improvements: except only in the continuation of the military tenures, and a few other points, which ſtill armed the crown with a very op-

[1] See pag. 86.

preſſive and dangerous prerogative. It is alſo to be remarked, that the ſpirit of enriching the clergy and endowing religious houſes had (through the former abuſe of it) gone over to ſuch a contrary extreme, and the princes of the houſe of Tudor and their favourites had fallen with ſuch avidity upon the ſpoils of the church, that a decent and honourable maintenance was wanting to many of the biſhops and clergy. This produced the *reſtraining* ſtatutes, to prevent the alienations of lands and tithes belonging to the church and univerſities. The number of indigent perſons being alſo greatly increaſed, by withdrawing the alms of the monaſteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even feeding and cloathing of millions; by affording them the means (with proper induſtry) to feed and to cloath themſelves. And, the farther any ſubſequent plans for maintaining the poor have departed from this inſtitution, the more impracticable and even pernicious their viſionary attempts have proved.

[433] HOWEVER, conſidering the reign of queen Elizabeth in a great and political view, we have no reaſon to regret many ſubſequent alterations in the Engliſh conſtitution. For, though in general ſhe was a wiſe and excellent princeſs, and loved her people; though in her time trade flouriſhed, riches increaſed, the laws were duly adminiſtered, the nation was reſpected abroad, and the people happy at home; yet, the increaſe of the power of the ſtar-chamber, and the erection of the high commiſſion court in matters eccleſiaſtical, were the work of her reign. She alſo kept her parliaments at a very awful diſtance: and in many particulars ſhe, at times, would carry the prerogative as high as her moſt arbitrary predeceſſors. It is true, ſhe very ſeldom exerted this prerogative, ſo as to oppreſs individuals; but ſtill ſhe had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power to play the tyrant. This is a high encomium on her merit; but at the ſame time it is ſufficient to ſhew, that theſe were not

thoſe golden days of genuine liberty that we formerly were taught to believe: for, ſurely, the true liberty of the ſubject conſiſts not ſo much in the gracious behaviour, as in the limited power, of the ſovereign.

THE great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet ſure degrees, for as great a revolution in government: yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progreſs of thoſe very means which afterwards reduced it's power. It is obvious to every obſerver, that, till the cloſe of the Lancaſtrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a ſtate of great ignorance; their perſonal wealth, before the extenſion of trade, was comparatively ſmall; and the nature of their landed property was ſuch, as kept them in continual dependence upon their feodal lord, being uſually ſome powerful baron, ſome opulent abbey, or ſometimes the king himſelf. Though a notion of general [434] liberty had ſtrongly pervaded and animated the whole conſtitution, yet the particular liberty, the natural equality, and perſonal independence of individuals, were little regarded or thought of; nay even to aſſert them was treated as the height of ſedition and rebellion. Our anceſtors heard, with deteſtation and horror, thoſe ſentiments rudely delivered, and puſhed to moſt abſurd extremes, by the violence of a Cade and a Tyler; which have ſince been applauded, with a zeal almoſt riſing to idolatry, when ſoftened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

BUT when learning, by the invention of printing and the progreſs of religious reformation, began to be univerſally diſſeminated; when trade and navigation were ſuddenly carried to an amazing extent, by the uſe of the compaſs and the conſequent diſcovery of the Indies; the minds of men, thus en-

lightened by ſcience and enlarged by obſervation and travel, began to entertain a more juſt opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants, and middling rank; while the two great eſtates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoveriſhed and weakened. The popiſh clergy, detected in their frauds and abuſes, expoſed to the reſentment of the populace, and ſtripped of their lands and revenues, ſtood trembling for their very exiſtence. The nobles, enervated by the refinements of luxury, (which knowledge, foreign travel, and the progreſs of the politer arts, are too apt to introduce with themſelves,) and fired with diſdain at being rivalled in magnificence by the opulent citizens, fell into enormous expences; to gratify which they were permitted, by the policy of the times, to diſſipate their overgrown eſtates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the ſpoil of the monaſteries and the great increaſe of the cuſ-
[435] toms, grew rich, independent, and haughty: and the commons were not yet ſenſible of the ſtrength they had acquired, nor urged to examine it's extent by new burthens or oppreſſive taxations, during the ſudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the inſolence and tyranny of the orders more immediately above them, they never dreamed of oppoſing the prerogative, to which they had been ſo little accuſtomed; much leſs of taking the lead in oppoſition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were therefore the times of the greateſt deſpotiſm, that have been known in this iſland ſince the death of William the Norman: the prerogative, as it then ſtood by common law, (and much more when extended by act of parliament,) being too large to be endured in a land of liberty.

QUEEN Elizabeth, and the intermediate princes of the Tudor line, had almoſt the ſame legal powers, and ſometimes exerted

exerted them as roughly, as their father king Henry the eighth. But the critical ſituation of that princeſs with regard to her legitimacy, her religion, her enmity with Spain, and her jealouſy of the queen of Scots, occaſioned greater caution in her conduct. She probably, or her able adviſers, had penetration enough to diſcern how the power of the kingdom had gradually ſhifted it's channel, and wiſdom enough not to provoke the commons to diſcover and feel their ſtrength. She therefore drew a veil over the odious part of prerogative; which was never wantonly thrown aſide, but only to anſwer ſome important purpoſe: and, though the royal treaſury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, ſhe aſked for ſupplies with ſuch moderation, and managed them with ſo much œconomy, that the commons were happy in obliging her. Such, in ſhort, were her circumſtances, her neceſſities, her wiſdom, and her good diſpoſition, that never did a prince ſo long and ſo entirely, for the ſpace of half a century together, reign in the affections of the people.

On the acceſſion of king James I, no new degree of royal [436]
power was added to, or exerciſed by, him: but ſuch a ſceptre was too weighty to be wielded by ſuch a hand. The unreaſonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occaſions, and the claim of a more abolute power inherent in the kingly office than had ever been carried into practice, ſoon awakened the ſleeping lion. The people heard with aſtoniſhment doctrines preached from the throne and the pulpit, ſubverſive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciouſly ſupported: and common reaſon aſſured them, that, if it were of human origin, no conſtitution could eſtabliſh it without power of revocation, no precedent could ſanctify, no length of time could confirm it. The leaders felt the pulſe of the nation, and found they had

ability as well as inclination to reſiſt it; and accordingly reſiſted and oppoſed it, whenever the puſillanimous temper of the reigning monarch had courage to put it to the trial; and they gained ſome little victories in the caſes of concealments, monopolies, and the diſpenſing power. In the mean time, very little was done for the improvement of private juſtice, except the abolition of ſanctuaries, and the extenſion of the bankrupt laws, the limitation of ſuits and actions, and the regulating of informations upon penal ſtatutes. For I cannot claſs the laws againſt witchcraft and conjuration under the head of improvements; nor did the diſpute between lord Elleſmere and ſir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of juſtice.

INDEED when Charles the firſt ſucceeded to the crown of his father, and attempted to revive ſome enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the ſubject, the arbitrary impriſonments for refuſal, the exertion of martial law in time of peace, and other domeſtic grievances, clouded the morning of that
[437] miſguided prince's reign; which, though the noon of it began a little to brighten, at laſt went down in blood, and left the whole kingdom in darkneſs. It muſt be acknowledged that, by the petition of right, enacted to aboliſh theſe encroachments, the Engliſh conſtitution received great alteration and improvement. But there ſtill remained the latent power of the foreſt laws, which the crown moſt unſeaſonably revived. The legal juriſdiction of the ſtar-chamber and high commiſſion courts was alſo extremely great; though their uſurped authority was ſtill greater. And, if we add to theſe the diſuſe of parliaments, the ill timed zeal and deſpotic proceedings of the eccleſiaſtical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ſhip-money, and other projects, we may ſee grounds moſt amply ſufficient for ſeeking redreſs in a legal conſtitutional way. This redreſs, when ſought, was alſo conſtitutionally

conſtitutionally given: for all theſe oppreſſions were actually aboliſhed by the king in parliament, before the rebellion broke out, by the ſeveral ſtatutes for triennial parliaments, for aboliſhing the ſtar-chamber and high commiſſion courts, for aſcertaining the extent of foreſts and foreſt laws, for renouncing ſhip-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in conſequence of their feodal tenures: though it muſt be acknowledged that theſe conceſſions were not made with ſo good a grace, as to conciliate the confidence of the people. Unfortunately, either by his own miſmanagement, or by the arts of his enemies, the king had loſt the reputation of ſincerity; which is the greateſt unhappineſs that can befal a prince. Though he formerly had ſtrained his prerogative, not only beyond what the genius of the preſent times would bear, but alſo beyond the examples of former ages, he had now conſented to reduce it to a lower ebb than was conſiſtent with monarchical government. A conduct ſo oppoſite to his temper and principles, joined with ſome raſh actions and unguarded expreſſions, made the people ſuſpect that this condeſcenſion was merely temporary. Fluſhed therefore with the ſucceſs they had gained, fired with reſentment for paſt oppreſſions, and dreading the conſequences if the king ſhould regain his [438] power, the popular leaders (who in all ages have called themſelves the *people*) began to grow inſolent and ungovernable; their inſolence ſoon rendered them deſperate: and deſpair at length forced them to join with a ſet of military hypocrites and enthuſiaſts, who overturned the church and monarchy, and proceeded with deliberate ſolemnity to the trial and murder of their ſovereign.

I PASS by the crude and abortive ſchemes for amending the laws in the times of confuſion which followed; the moſt promiſing and ſenſible whereof (ſuch as the eſtabliſhment of new trials, the abolition of feodal tenures, the act of navigation, and ſome others) were adopted in the

V. FIFTH

V. FIFTH period, which I am next to mention, *viz.* after the reſtoration of king Charles II. Immediately upon which, the principal remaining grievance, the doctrine and conſequences of military tenures, were taken away and aboliſhed, except in the inſtance of corruption of inheritable blood, upon attainder of treaſon and felony. And though the monarch, in whoſe perſon the royal government was reſtored, and with it our antient conſtitution, deſerves no commendation from poſterity, yet in his reign, (wicked, ſanguinary, and turbulent as it was,) the concurrence of happy circumſtances was ſuch, that from thence we may date not only the re-eſtabliſhment of our church and monarchy, but alſo the complete reſtitution of Engliſh liberty, for the firſt time, ſince it's total abolition at the conqueſt. For therein not only theſe ſlaviſh tenures, the badge of foreign dominion, with all their oppreſſive appendages, were removed from incumbering the eſtates of the ſubject; but alſo an additional ſecurity of his perſon from impriſonment was obtained, by that great bulwark of our conſtitution, the *habeas corpus* act. Theſe two ſtatutes, with regard to our property and perſons, form a ſecond *magna carta*, as beneficial and effectual as that of Running-Mead. That only pruned the luxuriancies of the feodal ſyſtem; but the ſtatute of Charles the ſecond extirpated all it's
[439] ſlaveries; except perhaps in copyhold tenure; and there alſo they are now in great meaſure enervated by gradual cuſtom, and the interpoſition of our courts of juſtice. *Magna Carta* only, in general terms, declared, that no man ſhall be impriſoned contrary to law: the *habeas corpus* act points him out effectual means, as well to releaſe himſelf, though committed even by the king in council, as to puniſh all thoſe who ſhall thus unconſtitutionally miſuſe him.

To theſe I may add the abolition of the prerogatives of purveyance and pre-emption; the ſtatute for holding triennial parliaments; the teſt and corporation acts, which ſecure both our civil and religious liberties; the abolition of the writ *de haeretico comburendo*; the ſtatute of frauds and perjuries,

ries, a great and neceſſary ſecurity to private property; the ſtatute for diſtribution of inteſtates' eſtates, and that of amendments and *jeofails*, which cut off thoſe ſuperfluous niceties which ſo long had diſgraced our courts; together with many other wholeſome acts that were paſſed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewiſe conſider the freedom from taxes and armies which the ſubject then enjoyed, will be ſufficient to demonſtrate this truth, "that the "conſtitution of England had arrived to it's full vigour, and "the true balance between liberty and prerogative was happily eſtabliſhed by *law*, in the reign of king Charles the "ſecond."

IT is far from my intention to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What ſeems inconteſtible is this, that *by the law*[m], as it then ſtood, (notwithſtanding ſome invidious, nay dangerous branches of the prerogative have ſince been lopped off, and the reſt more clearly defined,) the people had as large [440] a portion of real liberty, as is conſiſtent with a ſtate of ſociety; and ſufficient power, reſiding in their own hands, to aſſert and preſerve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable cataſtrophe of the next reign. For when king Charles's deluded brother attempted to enſlave the nation, he found it was beyond his power: the people both could, and did, reſiſt him; and, in conſequence of ſuch reſiſtance, obliged him to quit his enterprize and his throne together. Which introduces us to the laſt period of our legal hiſtory; *viz.*

VI. FROM the revolution in 1688 to the preſent time. In this period many laws have paſſed; as the bill of rights, the

[m] The point of time at which I would chuſe to fix this *theoretical* perfection of our public law, is the year 1679; after the *habeas corpus* act was paſſed, and that for licenſing the preſs had expired: though the years which immediately followed it were times of great *practical* oppreſſion.

toleration

toleration act, the act of settlement with it's conditions, the act for uniting England with Scotland, and some others: which have asserted our liberties in more clear and emphatical terms; have regulated the succession of the crown by parliament, as the exigencies of religious and civil freedom required; have confirmed, and exemplified, the doctrine of resistance, when the executive magistrate endeavours to subvert the constitution; have maintained the superiority of the laws above the king, by pronouncing his dispensing power to be illegal; have indulged tender consciences with every religious liberty, consistent with the safety of the state; have established triennial, since turned into septennial, elections of members to serve in parliament; have excluded certain officers from the house of commons; have restrained the king's pardon from obstructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow peers; have regulated trials for high treason; have afforded our posterity a hope that corruption of blood may one day be abolished and forgotten; have (by the desire of his present majesty) set bounds to the civil list, and placed the administration of that revenue in hands that are accountable to parliament; and have (by the like desire) made the judges completely independent of the king, his ministers, and his successors. Yet, though these provisions have, in appearance and nomi-
[441] nally, reduced the strength of the executive power to a much lower ebb than in the preceding period; if on the other hand we throw into the opposite scale (what perhaps the immoderate reduction of the antient prerogative may have rendered in some degree necessary) the vast acquisition of force, arising from the riot-act, and the annual expedience of a standing army; and the vast acquisition of personal attachment, arising from the magnitude of the national debt, and the manner of levying those yearly millions that are appropriated to pay the interest; we shall find that the crown has, gradually and imperceptibly, gained almost as much in influence, as it has apparently lost in prerogative.

THE

THE chief alterations of moment (for the time would fail me to deſcend to *minutiae*) in the adminiſtration of private juſtice during this period, are the ſolemn recognition of the law of nations with reſpect to the rights of embaſſadors: the cutting off, by the ſtatute for the amendment of the law, a vaſt number of excreſcences, that in proceſs of time had ſprung out of the practical part of it: the protection of corporate rights by the improvements in writs of *mandamus*, and informations in nature of *quo warranto*: the regulations of trials by jury, and the admitting witneſſes for priſoners upon oath: the farther reſtraints upon alienation of lands in mortmain: the annihilation of the terrible judgment of *peine fort et dure*: the extenſion of the benefit of clergy, by aboliſhing the pedantic criterion of reading: the counterbalance to this mercy, by the vaſt increaſe of capital puniſhment: the new and effectual methods for the ſpeedy recovery of rents: the improvements which have been made in ejectments for the trying of titles: the introduction and eſtabliſhment of paper credit, by indorſements upon bills and notes, which have ſhewn the legal poſſibility and convenience (which our anceſtors ſo long doubted) of aſſigning a *choſe in action*: the tranſlation of all legal proceedings into the Engliſh language: the erection of courts of conſcience for recovering ſmall debts, and (which is much the better plan) the reformation of county courts: the great ſyſtem of marine juriſprudence, of which the foundations have been laid, by clearly developing the principles on which policies of inſurance are founded, and by happily applying thoſe principles to particular caſes: and, laſtly, the liberality of ſentiment, which (though late) has now taken poſſeſſion of our courts of common law, and induced them to adopt (where facts can be clearly aſcertained) the ſame principles of redreſs as have prevailed in our courts of equity, from the time that lord Nottingham preſided there; and this, not only where ſpecially impowered by particular ſtatutes, (as in the caſe of bonds, mortgages, and ſet offs,) but by extending the remedial influence of the equitable writ of treſpaſs on the caſe, according [442]

according to it's primitive inſtitution by king Edward the firſt, to almoſt every inſtance of injuſtice not remedied by any other proceſs. And theſe, I think, are all the material alterations that have happened with reſpect to private juſtice, in the courſe of the preſent century.

THUS therefore, for the amuſement and inſtruction of the ſtudent, I have endeavoured to delineate ſome rude outlines of a plan for the hiſtory of our laws and liberties; from their firſt riſe, and gradual progreſs, among our Britiſh and Saxon anceſtors, till their total eclipſe at the Norman conqueſt; from which they have gradually emerged, and riſen to the perfection they now enjoy, at different periods of time. We have ſeen, in the courſe of our inquiries, in this and the former volumes, that the fundamental maxims and rules of the law, which regard the rights of perſons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wiſdom of ages: that the forms of adminiſtering juſtice came to perfection under Edward the firſt; and have not been much varied, nor always for the better, ſince: that our religious liberties were fully eſtabliſhed at the reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained, till after the reſtoration of king Charles, nor fully
[443] and explicitly acknowledged and defined, till the æra of the happy revolution. Of a conſtitution ſo wiſely contrived, ſo ſtrongly raiſed, and ſo highly finiſhed, it is hard to ſpeak with that praiſe, which is juſtly and ſeverely it's due:—the thorough and attentive contemplation of it will furniſh it's beſt panegyric. It hath been the endeavour of theſe commentaries, however the execution may have ſucceeded, to examine it's ſolid foundations, to mark out it's extenſive plan, to explain the uſe and diſtribution of it's parts, and from the harmonious concurrence of thoſe ſeveral parts to demonſtrate the elegant proportion of the whole. We have taken occaſion

to

to admire at every turn the noble monuments of antient ſimplicity, and the more curious refinements of modern art. Nor have it's faults been concealed from view; for faults it has, leſt we ſhould be tempted to think it of more than human ſtructure; defects, chiefly ariſing from the decays of time, or the rage of unſkilful improvements in later ages. To ſuſtain, to repair, to beautify this noble pile, is a charge intruſted principally to the nobility, and ſuch gentlemen of the kingdom as are delegated by their country to parliament. The protection of THE LIBERTY of BRITAIN is a duty which they owe to themſelves, who enjoy it; to their anceſtors, who tranſmitted it down; and to their poſterity, who will claim at their hands this, the beſt birthright, and nobleſt inheritance of mankind.

THE END OF THE FOURTH BOOK.

APPENDIX.

APPENDIX.

§ 1. RECORD *of an Indictment and Conviction of* MURDER, *at the Aſſiſes.*

Warwickſhire, to wit, } BE it remembered, that at the general ſeſſion of the lord the king of *oyer* and *terminer* holden at Warwick in and for the ſaid county of Warwick, on Friday the twelfth day of March in the ſecond year of the reign of the lord George the third, now king of Great Britain, before ſir Michael Foſter, knight, one of the juſtices of the ſaid lord the king aſſigned to hold pleas before the king himſelf, ſir Edward Clive, knight, one of the juſtices of the ſaid lord the king, of his court of common bench, and others their fellows, juſtices of the ſaid lord the king, aſſigned by letters patent of the ſaid lord the king, under his great ſeal of Great Britain, made to them the aforeſaid juſtices and others, and any two or more of them, (whereof one of them the ſaid ſir Michael Foſter and ſir Edward Clive, the ſaid lord the king would have to be one,) to inquire (by the oath of good and lawful men of the county aforeſaid, by whom the truth of the matter might be the better known, and by other ways, methods, and means, whereby they could or might the better know, as well within liberties as without) more fully the truth of all treaſons, miſpriſions of treaſons, inſurrections, rebellions, counterfeitings, clippings, waſhings, falſe coinings, and other falſities of the monies of Great Britain, and of other kingdoms or dominions whatſoever; and of all murders, felonies, manſlaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful aſſemblies, miſpriſions, confederacies, falſe allegations, treſpaſſes, riots, routs, retentions, eſcapes, contempts, falſities, negligences, concealments, maintenances, oppreſſions, champarties, deceits,

Seſſion of *oyer* and *terminer*.

Commiſſion of

deceits, and all other miſdeeds, offences, and injuries whatſoever, and alſo the acceſſories of the ſame, within the county aforeſaid as well within liberties as without, by whomſoever and howſoever done, had, perpetrated, and committed, and by whom, to whom, when, how, and in what manner; and of all other articles and circumſtances in the ſaid letters patent of the ſaid lord the king ſpecified; the premiſes and every or any of them howſoever concerning; and for this time to hear and determine the ſaid treaſons and other the premiſes, according to the law and cuſtom of the realm of England; and alſo keepers of the peace, and juſtices of the ſaid lord the king, aſſigned to hear and determine divers felonies, treſpaſſes, and other miſdemeſnors committed within the county aforeſaid, by the oath of ſir James Thomſon, baronet, Charles Roper, Henry Dawes, Peter Wilſon, Samuel Rogers, John Dawſon, James Philips, John Mayo, Richard Savage, William Bell, James Morris, Lawrence Hall, and Charles Carter, eſquires, good and lawful men of the county aforeſaid, then and there impanelled, ſworn, and charged to inquire for the ſaid lord the king and for the body of the ſaid county, it is preſented, that Peter Hunt, late of the pariſh of Lighthorne in the ſaid county, gentleman, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the fifth day of March in the ſaid ſecond year of the reign of the ſaid lord the king, at the pariſh of Lighthorne aforeſaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the ſaid lord the king then and there being, felonioufly, wilfully, and of his malice aforethought, did make an aſſault; and that the ſaid Peter Hunt with a certain drawn ſword, made of iron and ſteel, of the value of five ſhillings, which he the ſaid Peter Hunt in his right hand then and there had and held, him the ſaid Samuel Collins, in and upon the left ſide of the belly of him the ſaid Samuel Collins then and there felonioufly, wilfully, and of his malice aforethought, did ſtrike, thruſt, ſtab, and penetrate; giving unto the ſaid Samuel Collins, then and there, with the ſword drawn as aforeſaid, in and upon the left ſide of the belly of him the ſaid Samuel Collins, one mortal wound of the breadth of one inch, and the depth of nine inches; of which ſaid mortal wound he the ſaid Samuel Collins, at the pariſh of Lighthorne aforeſaid in the ſaid county of Warwick, from the ſaid fifth day of March in the year aforeſaid until the ſeventh day of the ſame month in the ſame year, did languiſh, and languiſhing did live; on which ſaid ſeventh day of March in the year aforeſaid, the ſaid Samuel Collins, at the pariſh of Lighthorne aforeſaid, in the county aforeſaid, of the ſaid mortal wound did die: and ſo the jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid Peter Hunt him the ſaid Samuel Collins, in manner and form aforeſaid, felonioufly, wilfully, and of his malice aforethought,

oyer and terminer, and of the peace.

Grand jury.

Indictment.

thought, did kill and murder, againſt the peace of the ſaid lord the now king, his crown, and dignity. **Whereupon** the ſheriff of the county aforeſaid is commanded, that he omit not for any liberty in his bailiwick, but that he take the ſaid Peter Hunt, if he may be found in his bailiwick, and him ſafely keep, to anſwer to the felony and murder whereof he ſtands indicted. **Which** ſaid indictment the ſaid juſtices of the lord the king abovenamed, afterwards, to wit, at the delivery of the gaol of the ſaid lord the king, holden at Warwick in and for the county aforeſaid, on Friday the ſixth day of Auguſt in the ſaid ſecond year of the reign of the ſaid lord the king, before the right honourable William lord Mansfield, chief juſtice of the ſaid lord the king, aſſigned to hold pleas before the king himſelf, ſir Sidney Stafford Smythe, knight, one of the barons of the exchequer of the ſaid lord the king, and others their fellows, juſtices of the ſaid lord the king, aſſigned to deliver his ſaid gaol of the county aforeſaid of the priſoners therein being, by their proper hands to deliver here in court of record in form of the law to be determined. **And afterwards**, to wit, at the ſame delivery of the gaol of the ſaid lord the king of his county aforeſaid, on the ſaid Friday the ſixth day of Auguſt, in the ſaid ſecond year of the reign of the ſaid lord the king, before the ſaid juſtices of the lord the king laſt abovenamed and others their fellows aforeſaid, here cometh the ſaid Peter Hunt, under the cuſtody of William Browne, eſquire, ſheriff of the county aforeſaid, (in whoſe cuſtody in the gaol of the county aforeſaid, for the cauſe aforeſaid, he had been before committed,) being brought to the bar here in his proper perſon by the ſaid ſheriff, to whom he is here alſo committed: **And** forthwith being demanded concerning the premiſes in the ſaid indictment above ſpecified and charged upon him, how he will acquit himſelf thereof, he ſaith, that he is not guilty thereof; and thereof for good and evil he puts himſelf upon the country: **And** John Blencowe, eſquire, clerk of the aſſiſes for the county aforeſaid, who proſecutes for the ſaid lord the king in this behalf, doth the like: **Therefore** let a jury thereupon here immediately come before the ſaid juſtices of the lord the king laſt abovementioned, and others their fellows aforeſaid, of free and lawful men of the neighbourhood of the ſaid pariſh of Lighthorne in the county of Warwick aforeſaid, by whom the truth of the matter may be the better known, and who are not of kin to the ſaid Peter Hunt, to recognize upon their oath, whether the ſaid Peter Hunt be guilty of the felony and murder in the indictment aforeſaid above ſpecified, or not guilty: becauſe as well the ſaid John Blencowe, who proſecutes for the ſaid lord the king in this behalf, as the ſaid Peter Hunt, have put themſelves upon the ſaid jury. And the jurors of the ſaid jury by the ſaid ſheriff for this purpoſe impanelled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes,

Capias.

Seſſion of gaol-delivery.

Arraignment.

Plea; not guilty.

Iſſue.

Venire.

Richard May, Walter Duke, Matthew Lion, James White, William Bates, Oliver Green, Bartholomew Naſh, and Henry Long, being called, come; who being elected, tried, and ſworn, to ſpeak the truth of and concerning the premiſes, upon their oath ſay, **that** the ſaid Peter Hunt is guilty of the felony and murder aforeſaid, on him above charged in the form aforeſaid, as by the indictment aforeſaid is above ſuppoſed againſt him; and that the ſaid Peter Hunt at the time of committing the ſaid felony and murder, or at any time ſince to this time, had not nor hath any goods or chattels, lands or tenements, in the ſaid county of Warwick, or elſewhere, to the knowledge of the ſaid jurors. And upon this it is forthwith demanded of the ſaid Peter Hunt, if he hath or knoweth any thing to ſay, wherefore the ſaid juſtices here ought not upon the premiſes and verdict aforeſaid to proceed to judgment and execution againſt him: who nothing farther ſaith, unleſs as he before had ſaid. **Whereupon**, all and ſingular the premiſes being ſeen, and by the ſaid juſtices here fully underſtood, **it is conſidered** by the court here, that the ſaid Peter Hunt be taken to the gaol of the ſaid lord the king of the ſaid county of Warwick, from whence he came, and from thence to the place of execution on Monday now next enſuing, being the ninth day of this inſtant Auguſt, and there be hanged by the neck until he be dead; and that afterwards his body be diſſected and anatomized.

Verdict; guilty of *murder*.

Judgment of death,

and diſſection.

§ 2. *Conviction of* Manſlaughter.

——— upon their oath ſay, that the ſaid Peter Hunt is not guilty of the murder aforeſaid, above charged upon him; but that the ſaid Peter Hunt is guilty of the felonious ſlaying of the aforeſaid Samuel Collins; and that he had not nor hath any goods or chattels, lands or tenements, at the time of the felony and manſlaughter aforeſaid, or ever afterwards to this time, to the knowlege of the ſaid jurors. And immediately it is demanded of the ſaid Peter Hunt, if he hath or knoweth any thing to ſay, wherefore the ſaid juſtices here ought not upon the premiſes and verdict aforeſaid to proceed to judgment and execution againſt him: who ſaith that he is a clerk, and prayeth the benefit of clergy to be allowed him in this behalf. **Whereupon**, all and ſingular the premiſes being ſeen, and by the ſaid juſtices here fully underſtood, **it is conſidered** by the court here, that the ſaid Peter Hunt be burned in his left hand, and delivered. And immediately he is burned in his left hand and is delivered, according to the form of the ſtatute.

Verdict;— not guilty of *murder*; guilty of *manſlaughter*.

Clergy prayed.

Judgment to be burned in the hand, and delivered.

§ 3.

§ 3. *Entry of a Trial* inſtanter *in the Court of King's Bench, upon a collateral Iſſue; and Rule of Court for Execution thereon.*

Michaelmas term, in the ſixth year of the reign of king George the third.

Kent; The King againſt Thomas Rogers. } **The priſoner** at the bar being brought into this court in cuſtody of the ſheriff of the county of Suſſex, by virtue of his majeſty's writ of *habeas corpus*, **it is ordered** that the ſaid writ and the return thereto be filed. **And** it appearing by a certain record of attainder, which hath been removed into this court by his majeſty's writ of *certiorari*, that the priſoner at the bar ſtands attainted, by the name of Thomas Rogers, of felony for a robbery on the highway, and the ſaid priſoner at the bar having heard the record of the ſaid attainder now read to him, is now aſked by the court here, what he hath to ſay for himſelf, why the Court here ſhould not proceed to award execution againſt him upon the ſaid attainder? **He** for plea ſaith, that he is not the ſame Tnomas Rogers in the ſaid record of attainder, named, and againſt whom judgment was pronounced: and this he is ready to verify and prove, *&c.* **To** which ſaid plea the honourable Charles Yorke, eſquire, attorney-general of our preſent ſovereign lord the king, who for our ſaid lord the king in this behalf proſecuteth, being now preſent here in court, and having heard what the ſaid priſoner at the bar hath now alleged, for our ſaid lord the king by way of reply ſaith, that the ſaid priſoner now here at the bar is the ſame Thomas Rogers in the ſaid record of attainder named, and againſt whom judgment was pronounced as aforeſaid; and this he prayeth may be inquired into by the country; and the ſaid priſoner at the bar doth the like: **Therefore** let a jury in this behalf immediately come here into court, by whom the truth of the matter will be the better known, and who have no affinity to the ſaid priſoner, to try upon their oath, whether the ſaid priſoner at the bar be the ſame Thomas Rogers in the ſaid record of attainder named, and againſt whom judgment was ſo pronounced as aforeſaid, or not; becauſe as well the ſaid Charles Yorke, eſquire, attorney-general of our ſaid lord the king, who for our ſaid lord the king in this behalf proſecutes, as the ſaid priſoner at the bar, have put themſelves in this behalf upon the ſaid jury. **And** immediately thereupon the ſaid jury come here into court; and being elected, tried, and ſworn to ſpeak the truth touching and concerning the premiſes aforeſaid, and having heard the ſaid record read to them, do ſay upon their

Habeas corpus. Record of attainder read; for felony and robbery. Priſoner aſked what he can ſay in bar of execution. Plea; not the ſame perſon. Replication, averring that he is. Iſſue joined. *Venire* awarded *inſtanter.* Jury.

oath, that the ſaid priſoner at the bar is the ſame Thomas Rogers in the ſaid record of attainder named, and againſt whom judgment was ſo pronounced as aforeſaid, in manner and form as the ſaid attorney-general hath by his ſaid replication to the ſaid plea of the ſaid priſoner now here at the bar alleged. **And hereupon** the ſaid attorney-general on behalf of our ſaid lord the king now prayeth, that the court here would proceed to award execution againſt him the ſaid Thomas Rogers upon the ſaid attainder. **Whereupon**, all and ſingular the premiſes being now ſeen and fully underſtood by the court here, **it is ordered** by the court here, that execution be done upon the ſaid priſoner at the bar for the ſaid felony in purſuance of the ſaid judgment, according to due form of law: **And** it is laſtly ordered, that he the ſaid Thomas Rogers, the priſoner at the bar, be now committed to the cuſtody of the ſheriff of the county of Kent (now alſo preſent here in court) for the purpoſe aforeſaid; and that the ſaid ſheriff of Kent do execution upon the ſaid defendant the priſoner at the bar for the ſaid felony, in purſuance of the ſaid judgement, according to due form of law.

Verdict; that he is the ſame.

Award of execution.

On the motion of Mr. Attorney General.

By the Court.

§ 4. *Warrant of Execution on Judgment of Death, at the general Gaol delivery in* London *and* Middleſex.

London and Middleſex. } To the ſheriffs of the city of London; and to the ſheriff of the county of Middleſex: and to the keeper of his majeſty's gaol of Newgate.

Whereas at the ſeſſion of gaol delivery of Newgate, for the city of London and county of Middleſex, holden at Juſtice Hall in the Old Bailey, on the nineteenth day of October laſt, Patrick Mahony, Roger Jones, Charles King, and Mary Smith, received ſentence of death for the reſpective offences in their ſeveral indictments mentioned: **Now it is hereby ordered**, that execution of the ſaid ſentence be made and done upon them the ſaid Patrick Mahony and Roger Jones, on Wedneſday the ninth day of this inſtant month of November at the uſual place of execution. **And** it is his majeſty's command, that execution of the ſaid ſentence upon them the ſaid Charles King and Mary Smith be reſpited, until his majeſty's pleaſure touching them be farther known.

Given under my hand and ſeal this fourth day of November, one thouſand ſeven hundred and ſixty eight.

James Eyre, Recorder. L. S.

§ 5.

§ 5. *Writ of Execution upon a Judgment of* Murder, *before the* King *in* Parliament.

GEORGE the ſecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth, to the ſheriffs of London and ſheriff of Middleſex, greeting. Whereas Lawrence earl Ferrers, viſcount Tamworth, hath been indicted of felony and murder by him done and committed, which ſaid indictment hath been certified before us in our preſent parliament: and the ſaid Lawrence earl Ferrers, viſcount Tamworth, hath been thereupon arraigned, and upon ſuch arraignment hath pleaded not guilty; and the ſaid Lawrence earl Ferrers, viſcount Tamworth, hath before us in our ſaid parliament been tried, and in due form of law convicted thereof; and whereas judgment hath been given in our ſaid parliament, that the ſaid Lawrence earl Ferrers, viſcount Tamworth, ſhall be hanged by the neck till he is dead, and that his body be diſſected and anatomized, the execution of which judgment yet remaineth to be done: We require, and by theſe preſents ſtrictly command you, that upon Monday the fifth day of May inſtant, between the hours of nine in the morning and one in the afternoon of the ſame day, him the ſaid Lawrence earl Ferrers, viſcount Tamworth, without the gate of our tower of London (to you then and there to be delivered, as by another writ to the lieutenant of our tower of London or to his deputy directed, we have commanded) into your cuſtody you then and there receive: and him, in your cuſtody ſo being, you forthwith convey to the accuſtomed place of execution at Tyburn: and that you do cauſe execution to be done upon the ſaid Lawrence earl Ferrers, viſcount Tamworth, in your cuſtody ſo being, in all things according to the ſaid judgment. And this you are by no means to omit, at your peril. Witneſs ourſelf at Weſtminſter the ſecond day of May, in the thirty-third year of our reign.

Yorke and Yorke.

THE END.

INDEX.

INDEX.

☞ *The large numerals denote the volumes; the ciphers the pages of the commentaries; and the ſmall numerals the pages of the appendix.*

A

Abatement of freehold. III. 168.
---- indictment. IV. 334.
-------- nuſance. III. 5.
-------- writ, count, or ſuit. III. 302.
--------, plea in, III. 301. IV. 334.
Abbey-lands. II. 32. IV. 115.
--------, moleſting their poſſeſſors, IV. 116.
Abbots. I. 155.
Abbreviations. III. 323.
Abdication. I. 212. IV. 78.
Abduction of child. III. 140.
------ heireſs. IV. 208.
------ ward. III. 141.
------ wife. III. 139.
------ women. I. 443.
------ or kidnapping. IV. 219.
Abearance, good ſecurity for. IV. 251. 256.
Abeyance. II. 107.
Abigei. IV. 239.
Abjuration, oath of. I. 368.
------- of the realm. IV. 56. 124. 332. 377.
Abſolute power of the crown. I. 250.
------ property. II. 389.
------ rights and duties. I. 123.
Abſtract of a fine. II. 351. xv.
Accedas ad curiam. III. 34.
Acceptance of bills. II. 468.
Acceſſion, property by, II. 404.
Acceſſories. IV. 35.
------- after the fact. IV. 37.
Acceſſories, before the fact. IV. 36.
-------- when to be tried. IV. 323.
Accidents, when relieved againſt, III. 431.
Accomplices, diſcovery of. IV. 330, 331.
Accord. III. 15.
Account books, when evidence. III. 368.
----- cognizable in equity. III. 437.
----- writ of. III. 164.
Accroaching royal power. IV. 76.
Ac etiam. III. 288. xxiii.
Act of bankruptcy. III. 477.
----- grace, how paſſed. I. 184.
-------- when pleaded, IV. 396.
----- parliament. I. 85.
----------, diſobedience to. IV. 122.
----- ------, how made. I. 181.
----------, it's antient form. I. 182.
----------, power. I. 186.
----------, private. I. 86. II. 344.
----------, public. I. 85.
----------, when binding on the crown. I. 261.
Action at law. III. 116.
----, *choſe* in. II. 397.
----- *ex contractu.* III. 117.
------ *delicto.* III. 117.
------ feodal. III. 117.
------ mixed. III. 118.
------ perſonal. III. 117.

Action, plea to. III. 303.
----, property in. II. 396.
----, real. III. 117.
Actual right of poſſeſſion. II. 196.
Additions. I. 407. III. 302. IV. 305. 334.
Adherence to the king's enemies. IV. 82.
Adjoining county, trial in. III. 383.
Adjournment of parliament. I. 187.
Admeaſurement of dower. II. 136. III. 183.
---------- paſture. III. 238.
Adminiſtration. II. 489.
---------- *cum teſtamento annexo.* II. 504.
---------- *de bonis non.* II. 506.
---------- *durante abſentia.* II. 503.
---------- *minore aetate.* II. 503.
---------- limited or ſpecial. II. 506.
Adminiſtrator. II. 496. IV. 428.
Admiralty cauſes. III. 106.
-------, court of, III. 69. IV. 268.
Admiſſion of a clerk. I. 390.
Admiſſion to copyholds. II. 370.
Admittendum clericum, writ *ad.* III. 250.
Ad quod damnum, writ of. II. 271.
Advertiſing for ſtolen goods. IV. 134.
Adultery. I. 441. III. 139. IV. 64, 65. 191.
Advocate. III. 26.
Advocatus fiſci. III. 27.
Advowſon. II. 21. IV. 426.
Aequitas ſequitur legem. II. 330. III. 441.
Affectum challenge *propter.* III. 363. IV. 352.
Affeerors of amercements. IV. 380.
Affidavit. III. 304.
Affinity. I. 434.
Affirmance of judgments. III. 411.
Affray. IV. 145.
Age, action ſuſpended by. III. 300.
Age, of conſent to marriage. I. 436.
----- perſons, how reckoned. I. 463. IV. 22.
Aggregate corporation. I. 469.
------- fund. I. 331.
Agiſtment. II. 452.
Agnati. II. 235.
Agnus Dei, &c. IV. 115.
Agriculture, its original. II. 7.
Aid-prayer. III. 300.
Aids, feodal. II. 63. 86. IV. 411.
---, parliamentary. I. 308.
Air, right to. II. 14.
Albinatus jus. 372. 374.
Alderman. I. 116.
Alderney, iſland of. I. 107.
Alehouſes. IV. 64. 167.
Alfred, his dome book. I. 64. IV. 411.
Alias writ. III. 283. xix. IV. 319.
Alienation. II. 287.
-------, fine for. II. 71. IV. 418.
-------, forfeiture by. II. 268.
Alien priories. I. 386. IV. 113.
Aliens. I. 366. 371. II. 249. 274. 293. IV. 111.
---- duty. I. 315. 317. 372. 374.
Alimony. I. 441. III. 94.
Allegation. III. 100.
Allegiance. I. 366. IV. 74.
-------, local. I. 370.
-------, natural. I. 369.
-------, oath of. I. 367. IV. 273.
----------, refuſing it. IV. 116.
-------, withdrawing from. IV. 87.
Allodial property. II. 47. 60.
Allodium. II. 105.
Allowance of franchiſe. III. 263.
--------- pardons. IV. 401. 402.
--------- writs of error. IV. 392.
------ to bankrupts. II. 483.
Alluvion. II. 261.
Almanac, its authority. III. 333.
Alteration of deeds. II. 308.
Amended bill in equity. III. 448.

Amendment at law. III. 407. IV. 439.
Amercement. II. xix. III. 376. III. v, vi. xxxi. xxxiii. IV. 379. 423.
- - - - - - - action for. III. 159.
American colonies. I. 107.
Anceſtor. II. 209.
Anceſtors, how numerous. II. 203.
Anceſtral Actions. III. 186.
Animals, larciny, of. IV. 235.
- - - -, property in. II. 5.
Animus furandi. IV. 230. 232.
- - - *revertendi*. II. 392.
Annual parliaments. I. 153.
Annuities. II. 40.
- - - - - for lives. II. 461.
Annulum et baculum, inveſtiture, *per*. I. 378.
Annus luctus. I. 456.
Anſwer in chancery. III. 446.
- - - - upon Oath. III. 100.
Antient demeſne. I. 286. II. 99.
Apoſtacy. IV. 43.
Apparel, exceſs in. IV. 171.
Apparent heir. II. 208.
- - - - - right of poſſeſſion. II. 196.
Appeal by approvers. IV. 330.
- - - - how differing from writ of error. III. 55.
- - - - of arſon, IV. 314.
- - - - - death. IV. 314. 424.
- - - - - felony. IV. 314.
- - - - - larciny. IV. 314.
- - - - - mayhem. IV. 314.
- - - - - rape. IV. 314.
- - - - - treaſon. IV. 314.
- - - -, proſecution by. IV. 312. 424.
- - - - to parliament. III. 454.
- - - - - Rome. IV. 115. 421.
Appearance to actions. III. 290.
Appearance-day of the term, or return. III. 278.
Appellee on approvement. IV. 330.
Appendant, advowſon. II. 22.
- - - - - -, common. II. 233.
Appointment to charitable uſes. II. 376.
Appraiſement, commiſſion of. III. 262.
Apprentice-fee, duty on. I. 324.
Apprentices. I. 426, 427. IV. 160.
Apprentitii ad legem. III. 27.
Appropriations. I. 384.
Approvement in felony and treaſon. IV. 329.
- - - - - - - - of commons. II. 34. III. 240.
Approvers. IV. 329.
- - - - - -, compelling priſoners to become. IV. 128.
Appurtenant, common. II. 33.
Arbitrary conſecrations of tithes. I. 113. II. 26.
Arbitration. III. 16.
Archbiſhop. I. 155. 377.
Archdeacon. I. 383.
- - - - - -, his court. III. 64.
Archdeaconry. I. 112.
Arches court. III. 64.
- - - -, dean of. III. 65.
Areopagus, court of. III. 365. IV. 169. 348.
Ariſtocracy. I. 49.
Armed, being unuſually. IV. 149.
Armies. I. 262.
- - - -, ſtanding. I. 414. IV. 419. 439. 441.
Armorial enſigns. II. 428. III. 105.
Armour, &c. embezzling the king's. IV. 101.
- - - -, ſtatutes of. I. 411.
Arms and ammunition, exporting them. I. 265.
- - -, right of having, I. 143.
Arraignment. IV. 322. iii.
- - - - - - - -, incidents to. IV. 324.
Array, challenge to. III. 359. IV. 352.
- - -, commiſſion of. I. 411.
Arreſt of judgment. III. 393. xiv. IV. 375.
- - - - perſons. III. 288. IV. 289.
- - - - ſeamen and ſoldiers. I. 421.
Arſon. IV. 220. 372.
- - - -, appeal of. IV. 314.
Articles of the navy. I. 420.
- - - - - - war. I. 415.
Artificers. I. 407.

Artificers, reſiding abroad. IV. 160.
- - - - -, tranſporting them. IV. 160.
As, Roman diviſions of. II. 462.
Aſcendants excluded from inheriting. II. 210.
Aſportation. IV. 231.
Aſſault. III. 120. IV. 145. 216.
- - - -, coſts in actions for. III. 400.
Aſſembly of eſtates. I. 147.
- - - - -, riotous or unlawful. IV. 146.
Aſſenſu patris, dower *ex*. II. 132.
Aſſeſſments. I. 312.
Aſſets. II. 510.
- - - by deſcent, or real. II. 244. 302. 340.
- - - perſonal. II. 510.
Aſſignees of bankrupt. II. 480.
Aſſignment of bankrupts' effects. II. 485.
- - - - - - - *choſe* in action. II. 442.
- - - - - - - dower. II. 135.
- - - - - - - errors. III. 25.
- - - - - - - eſtate. II. 326.
- - - - - - - reverſions. III. 158.
Aſſigns. II. 289.
Aſſiſe, certificate of. III. 389.
- - -, commiſſion of. III. 60. IV. 269. 424.
- - -, court of. III. 58.
- - -, general. I. 148.
- - -, grand. III. 341. 351. vi. IV. 422.
- - -, juſtices of. III. 59. IV. 269.
- - - - - - - - -, killing them. IV. 84.
- - - of arms. I. 411. II. 66.
- - - - bread, breaking. IV. 159.
- - -, rent of. II. 42.
- - -, turned into a jury. III. 403.
- - -, writ of. III. 184. IV. 422.
Aſſociation, writ of. III. 60.
Aſſumpſit, expreſs. III. 158.
- - - - -, implied. III. 159.
Aſſurances, common. II. 294.
- - - - -, covenant for farther. II. xi.
Atheling. I. 199.
Attachment againſt witneſſes. III. 369.
- - - - - - for contempts. IV. 283.
- - - - - - in chancery. III. 433, 444.
Attachment in chancery, with proclamations, III. 444.
Attachment, writ of. III. 280. xvi.
Attachments, court of. III. 71.
Attainder. II. 251. IV. 380.
- - - - -, act of. IV. 259.
Attaint, grand jury in. III. 351.
- - - -, writ of. III. 402. IV. 361.
Attainted perſons. II. 290. IV. 380.
Attempt to rob. IV. 242.
- - - - - - ſteal fiſh. IV. 235.
Atteſtation of deeds. II. 307. i. iii. xii, xiii.
- - - - - - - - deviſes. II. 376.
Attorney at law. III. 25.
- - - - - - - -, action againſt. III. 165.
Attorney-general. III. 27.
- - - - - - - - - -, information by. III. 261. 427. IV. 308.
- - - -, warrant of, to confeſs judgment. III. 397.
Attornment. II. 72. 288. 290.
Aubaine, droit de. I. 372.
Audita querela, writ of. III. 405.
Auditors in account. III. 164.
Averium. II. 424.
Averment. III. 309. 313. IV. 340.
Augmentation of vicarages and curacies. I. 388.
Aula regia, or *regis*. III. 38. IV. 416. 422.
Aulnager, I. 275.
Avowry. III. 150.
Aurum reginae. I. 221.
Auter droit. II. 177.
Auterfoits acquit. IV. 335.
- - - - *attaint*. IV. 336.
- - - - *convict*. IV. 336.
Auter vie, tenant *pur*. II. 120.
Authorities in law. I. 72.
Award. III. 16.
Ayle, writ of. III. 186.

B

Bachelor, knight. I. 404.
Backing warrants. IV. 291.
Bail above, III. 290.
- - below. III. 291.

Bail, common. III. 287.
- - -, excepting to. III. 291.
- - -, exceſſive. I. 135. IV. 297.
- - -, in criminal caſes. IV. 297.
- - - - error. III. 410*.
- - -, juſtifying or perfecting. III. 291.
- - -, refuſing. IV. 297.
- - -, ſpecial. III. 287. xxiv.
- - -, taking inſufficient. IV. 297.
- - - to the action. III. 290.
- - - - - - ſheriff. III. 290.
Bailable or not, who. IV. 297. 8, 9.
Bail-bond. III. 290. xxiv.
Bailiffs. I. 345. 427.
- - - - of hundreds. I. 116. 345.
Bailiwick. I. 344. II. 38.
Bailment. II. 395. 451.
Bail-piece. III. 291. xxvi.
Ballot for jurors. III. 358.
Balnearii. IV. 239.
Baniſhment. I. 137. IV. 377. 401.
Bank. I. 328.
- - -, miſbehaviour of it's officers. IV. 234.
Bankrupt. II. 471. IV. 431. 436.
Bankruptcy. II. 285. 471.
- - - - - -, cognizance of. III. 428.
- - - - - -, fraudulent. IV. 157.
Banneret, knight. I. 403.
Banns. I. 439.
Bar of dower. II. 136.
- -, plea in. III. 306. IV. 335. 396.
- -, trial at. III. 352. IV. 351.
Bargain and ſale of lands. II. 338. ii.
Bargemaſter, action againſt. III. 165.
Baron. I. 398.
- - - - and feme. I. 433.
Baronet, I. 403.
Baronies. II. 62. 90.
- - - - - of biſhops. I. 156.
Barretry. IV. 134.
Barriſters. I. 23. III. 26.
Baſe fees. II. 109.
- - - ſervices. II. 61.
- - - tenants. II. 148.
Baſtard. I. 454.
- - - -, adminiſtration to. II. 505.
- - - -, concealment of it's death. IV. 198. 358.
Baſtard *eigné*. II. 248.
- - - -, incapacity of. I. 458.
- - - -, maintenance of. I. 457.
- - - -, puniſhment for having. IV. 65.
Bath, knight of the. I. 403.
Battel, trial by. III. 337. iv. IV. 346. 418. 421. 424.
Battery. III. 120. IV. 216.
- - - -, inſpection of, III. 333.
- - - -, of a clergyman. IV. 217.
- - - - - - - ſervant. III. 142.
Bawdy-houſes. IV. 29. 64. 167.
Beaconage, ſuit for. III. 108.
Beacons. I. 264.
Behaviour, good ſecurity for. IV. 251. 256. 402.
Beheading. IV. 92. 377.
Beneſices. IV. 107.
Benefit of clergy. IV. 333. 365. 413. 429. 441.
Benevolence, compulſive. I. 140. IV. 436.
Berwick. I. 98.
- - - -, part of England. I. 99.
Beſayle, writ of. III. 186.
Bigamy. IV. 163.
Bill for patents, *&c.* II. 346.
- - in equity. III. 442.
- - - - parliament, I. 181.
- - - - - - - - - - how paſſed. I. 181.
- - of exceptions. III. 372.
- - - exchange. II. 466.
- - - indictment. IV. 302.
- - - Middleſex. III. 285. xxii.
- - - privilege. III. 289.
- - - rights. I. 128. IV. 440.
- - or note, forging. IV. 248, 249.
- - - - - -, ſtealing. IV. 234.
Billa vera. IV. 305.
Biſhop. I. 155. 377, 401.
- - -, certificate of. III. 335.
- - -, not electing or conſecrating. IV. 115.
- - -, right of, to try or be tried as a peer. I. 401. IV. 264, 265.
Biſhopricks, nomination to. I. 378. IV. 108. 115. 415. 430.
Biſſextile year. II. 141.

Black act. III. 161. IV. 144. 208. 235. 245.
- - - lead, stealing of. IV. 234.
- - - maile. II. 43. IV. 244.
Blanch rent. II. 43.
Blasphemy. IV. 59.
Blench-holding. II. 43.
Blood corrupted. II. 251. IV. 388.
- - - inheritable. II. 246.
- - - of the first purchasor. II. 220.
- - -, restitution in. IV. 402.
- - - royal. I. 225.
- - -, whole and half. II. 227.
Body corporate. I. 467.
- - -, how protected. I. 134.
- - -, politic. I. 467.
Boiling to death. IV. 196.
Bona notabilia. II. 509.
- - - *vacantia.* I. 299.
Bond. II. 340. xiii. III. xxiv. IV. 442.
- - - of arbitration. III. 16.
- - - tenants. II. 148.
Bono et malo, writ *de*. IV. 270.
Book of rates. I. 317.
Book land. I. 90.
Books and papers, production of. III. 382.
- - -, popish, importing or selling them. IV. 115.
Borough. I. 115. II. 82.
- - - - courts. III. 80.
- - - - English. I. 75. II. 83.
Borrowing. II. 453.
Borsholder. I. 115. 356. IV. 413.
Botes. II. 35.
Bottomry. II. 457.
Bound bailiffs. I. 345.
Bounties on exportation I. 315
Bourdeaux, mayor of, his certificate. III. 334.
Bracton. I. 72. IV. 425.
Breach of close. III. 209.
- - - - - covenant. III. 155.
- - - - - duty, action for. III. 163.
- - - - - peace. IV. 142.
- - - - - pound. III. 146.
- - - - - prison. IV. 130.
Brehon law in Ireland. I. 100. IV. 313.
Brevia Testata. II. 307.
Bribery in elections. I. 179.
- - - - - magistrates. IV. 139.
Bridges. I. 357. IV. 424.
- - - - -, annoyances in. IV. 167.
- - - - - destroying. IV. 244.
British constitution. I. 50.
- - - - - islands. I. 105.
Britons, antient, their laws. I. 63. IV. 108.
Britton. I. 72. III. 408. IV. 427.
Brooke. I. 72.
Brothels, frequenting. IV. 64.
- - - - -, keeping. IV. 29. 64. 168.
Bubbles. IV. 117.
Buggery. IV. 215.
Bulles, papal. IV. 109, 110.
Burgage, tenure in. II. 82. IV. 419.
Burgesses in parliament, their election. I. 174.
Burglary. IV. 223.
Burial charges. II. 508.
- - - - of *felo de se*. IV. 190.
Burning in the cheek. IV. 99. 370. 377.
- - - - - - - - -hand. IV. 367. 369, 370. 372. 377. iv.
- - - - -, malicious, IV. 244, 5, 6.
- - - - - the king's ships, &c. IV. 101.
- - - - - to death. IV. 93. 204. 216. 222. 377. 408.
Butlerage. I. 315.
By-laws. I. 475.
- - - - -, action on. III. 159.

C

Calais, captain of, his certificate. III. 334.
Callendar of prisoners. IV. 403.
Calling the plaintiff. III. 376.
Cancelling deeds. II. 309.
- - - - - - - letters patent. III. 47, 48.
- - - - - - - wills. II. 502.
Canonical obedience. IV. 106. 112. 204.
- - - - - purgation. III. 342. IV. 368.

Canon law. I. 14, 19. 79. 82, 83. IV. 421, 422.
Canons of a church. I. 383.
- - - - - - - inheritance. II. 208.
- - - - - - - 1603. I. 83.
Capacity of guilt. IV. 20.
- - - - - - to purchaſe or convey. II. 290.
Capias ad audiendum judicium. IV. 375.
- - - - - *reſpondendum.* III. 281. xxiv. IV. 318. 429. iii.
- - - - - *ſatisfaciendum.* III. 160. 414. xxxiii.
- - - *in withernam.* III. 129. 149. 413.
- - - *pro fine.* III. 398.
- - - *utlagatum.* III. 284. xxii. IV. 320.
Capiatur, judgment. *quod.* III. 398. xv.
Capita, diſtribution *per.* II. 517.
- - - -, ſucceſſion *per.* II. 218.
Capital puniſhment. IV. 9. 18. 236*. 376. 413. 441.
Capite, tenants *in.* II. 60.
Caption of indictment. IV. 351. i.
Captives. II. 402.
Captures at ſea. II. 401.
Caput lupinum. IV. 320.
Carnal knowledge of infants. IV. 212.
Carrier, action againſt. III. 165.
Cart-bote. II. 35.
Caſe, action on. III. 52. 122. IV. 442.
- - - reſerved at *niſi prius.* III. 378.
- - - ſtated out of chancery. III. 453.
Caſtigatory for ſcolds. IV. 169.
Caſtration. IV. 206.
Caſu conſimili, writ *in.* III. 51.
- - - *proviſo*, writ of entry in, III. 183.
Caſual ejector. III. 202. ix.
Cattle, malicious killing or maiming. IV. 244, 5.
- - - -, owner, anſwerable for. III. 153. 211. IV. 197.
Caveat. III. 98. 246.
Cauſa matrimonii praelocuti, writ of entry. III. 183.
Cauſe, challenge for. IV. 353.
Cauſes of demurrer. III. 315. xxx.
Centenarius. I. 116.
Centeni. I. 116. III. 315.
Centumviri. III. 315.
Cepi corpus. III. 288. xviii. xxii. xxiv.
Certificate for coſts. III. 214.
- - - - - - into chancery. III. 453.
- - - - - - of aſſiſe. III. 389.
- - - - - - of bankrupt. II. 482.
- - - - - - - poor. I. 364.
- - - - - -, trial by. III. 333.
Certiorari facias. IV. 262. 265. 272. 320, 321.
Ceſſavit, writ of. III. 232.
Ceſſio bonorum. II. 473. 483.
Ceſſion of a benefice. I. 392.
Ceſluy que truſt. II. 328.
- - - - - - *vie.* II. 123.
- - - - - - *uſe.* II. 328.
Chains, hanging in. IV. 202.
Challenge of jury. III. 359. IV. 352.
- - - - to fight. IV. 150.
Chamberlain, lord great. III. 38.
Champerty. IV. 135.
Champions in trial by battel. III. 339. v.
Chance. IV. 26.
Chancellor, his name and office. III. 47.
- - - - - - - -, lord. III. 38. 47.
- - - - - - - -, killing him. IV. 84.
- - - - - - - of a dioceſe. I. 382.
- - - - - - - - the duchy of Lancaſter. III. 78.
- - - - - - - - - exchequer. III. 44.
- - - - - - - - - univerſity, his court. III. 83.
Chance medley. IV. 184.
Chancery, court of. III. 47. IV. 436.
Chapters. I. 382.
Charge to grand jury. IV. 303.
Charitable uſes. II. 273. 376.
- - - - - - - - -, commiſſion of. III. 428.
Charities, cognizance of. III. 427.
- - - - - -, informations for. III. 427.
Charter. II. 195.
Charter of the king. II. 346.
Charter-governments in America. I. 109.
Charter-land. II. 90.

Chase. II. 38. 416. IV. 415.
----, beasts of. II. 38. 415.
Chastity, homicide in defence of. IV. 181.
Chattels. II. 385.
-----, personal. II. 387.
-----, real. II. 386.
Chaud-medley. IV. 184.
Cheat, action against. III. 166.
Cheating. IV. 157.
------ at play. IV. 173.
Cheek, burning in. IV. 99. 370. 377.
Chester, county palatine of. I. 117.
-----, courts of. III. 78.
Chevisance, II. 474.
Chichele, archbishop, vindicated. IV. 113.
Chief baron of the exchequer. III. 44.
--- justices. III. 40, 41.
--- justiciary of England. III. 38. IV. 416.
--- rents. II. 42.
---, tenants in. II. 60.
Children, duties of. I. 453.
------, evidence of. IV. 214.
Chirograph. II. 296.
---------- of a fine. II. xv.
Chivalry, court of. III. 68. IV. 267.
----------, it's jurisdiction, III. 103. IV. 267.
-------, guardian in. I. 462.
-------, tenure in. II. 62.
Chose in action. II. 397.
---------, how assigned. II. 442. IV. 441.
----- possession. II. 389.
Christian courts. III. 64.
Christianity, offences against. IV. 44.
--------, part of the laws of England. IV. 60.
Church, burglary in. IV. 224.
-----, larciny in. IV. 240.
-----, marriage in. I. 439.
-----, offences against. IV. 50.
-----, or churchyard, affrays in. IV. 145.
-----, rate. I. 395. III. 92.
----, repairs of. III. 92.
Churchwardens. I. 394.
Cinque ports, courts of. III. 79.
Circuits. III. 59. IV. 422. 424.
Circumstantial evidence. III. 371.
Citation. III. 100.
Citizens in parliament, their electors. I. 174.
City. I. 115.
Civil corporations. I. 470.
--- death. II. 121.
--- injuries. III. 2.
--- law. I. 14. 19. 79. 81. 83. IV. 421, 422.
------- it's study forbidden. I. 19.
--- liberty. I. 6. 125. 251.
--- list. I. 332. IV. 440.
--- state. I. 396.
--- subjection. IV. 28.
Clarendon, constitutions of. IV. 422.
Clausum fregit. III. 209.
Clearing contempts in chancery. III. 445.
Clementine constitutions. I. 82.
Clergy. I. 376.
----- averse to the common law. I. 19, 20.
-----, benefit of. IV. 333. 565. 413. 429. 441.
-----, plea of. IV. 334.
-----, prayer of. IV. iv.
Clergymen, beating them. IV. 217.
Clerical habit and tonsure. IV. 366.
Clerico admittendo, writ *de*. III. 413.
Clerk in office. I. 17.
------ orders. I. 388. IV. 367.
--- of the market, his court. IV. 275.
------- peace. IV. 272.
Clients. III. 28.
Clipping the coin. IV. 90.
Cloaths, malicious destroying of. IV. 245.
Clocks, when introduced. III. 410.
Close, breach of. III. 209.
---- rolls. II. 346.
---- writs. II. 346.
Cloth, stealing from the tenters. IV. 238.
Coal-mines, setting fire to. IV. 246.
Coat-armour. II. 306. III. 105.
Code of Justinian. I. 81.

Code of Theodosius. I. 81.
Codicil. II. 500.
Cognati. II. 235.
Cognizance, claim of. III. 298. IV. 278.
- - - - - - - *de droit, come ceo, &c.* fine *fur*. II. 352.
- - - - - - - - - - - - *tantum*, fine *fur*. II. 353.
- - - - - - - - in replevin. III. 150.
- - - - - - - - of pleas. II. 38.
- - - - - - - - - - wrongs. III. 86.
Cognizee of a fine. II. 351. III. 157.
- - - - - - - recognizance. II. 341.
Cognizor of a fine. II. 350. III. 157.
- - - - - - - recognizance. II 341.
Cognovit actionem. III. 304. 397.
Coin, falsifying, *&c.* IV. 84. 88. 90. 98. 120.
- - -, felonies and misdemesnors relating to. IV. 98.
- - -, treasons relating to. IV. 84. 88. 90.
Coinage, instruments of, treason relative to. IV. 90.
- - -, right of. I. 277.
Coke, sir Edward. I. 72, 73.
Collateral consanguinity. II. 204.
- - - - - - descent. II. 220.
- - - - - - issue. IV. 396. v.
- - - - - - warranty. II. 301.
Collatio bonorum. II. 517.
Collation to a benefice. I. 391.
Collative advowsons. II. 22.
Collecting the goods of the deceased. II. 510.
Colleges. I. 471.
- - - - -, their visitors. I. 482.
Gollegia in the civil law. I. 469.
Colligendum bona defuncti, letters, *ad*. II. 505.
Colonies. I. 107. II. 7.
Colour in pleading. III. 309.
Combinations. IV. 159.
Combustio domorum. IV. 374.
Commenda. I. 393. IV. 107.
Commerce, king the arbiter of. I. 273.
Commission of array. I. 411.
- - - - - - - - bankrupt. II. 480.
- - - - - - - - lunacy. I. 305.
- - - - - - - - the peace. I. 351. IV. 270.
- - - - - - - to examine witnesses. III. 383. 438. 449.
- - - - - - - - take answers in equity. III. 447.
Commitment of bankrupt. II. 481.
- - - - - - - - - persons accused. IV. 296.
Committee of council. I. 231.
- - - - - - - - parliament. I. 183.
- - - - - - - - peers out of parliament. III. 58.
- - - - - - - - lunatic. I. 306.
Common appendant. II. 33.
- - - - - appurtenant. II. 33.
- - - - - bail. III. 287.
- - - - - barretor. IV. 133.
- - - - - because of vicinage. II. 33.
- - - - - bench, court of. III. 37.
- - - - - - - - - - - justices of, killing them. IV. 84.
- - - - -, disturbance of. III. 237.
- - - - -, estate in. II. 191. 399.
- - - - -, farrier, *&c.* action against. III. 164.
- - - - - form, proof of will in. II. 508.
- - - - - in gross. II. 34.
- - - - - informer. III. 161.
- - - - - jury. III. 358.
- - - - - law. I. 63. 67. IV. 411, 412.
- - - - - - - -, corporation by. I. 472.
- - - - - - - -, dower by. II. 132.
- - - - - - - -, guardian by. I. 461.
- - - - - - nuisance. IV. 166.
- - - - - - of estovers, II. 35.
- - - - - - - pasture. II. 34.
- - - - - - - piscary. II. 34.
- - - - - - - turbary. II. 34.
- - - - - - - pleas. III. 40.
- - - - - - - - - - court of. III. 37.
- - - - - - - - - -, court of, fixed at Westminster. I. 22, 23. III. 39. IV. 424.
- - - - - - prayer book, reviling of. IV. 50.

Common recovery. III. 182. 193. IV. 429.
- - - - - - right of. II. 32.
- - - - - - *ſans nombre*. III. 239.
- - - - - - ſcold. IV. 169.
- - - - - - ſeal. I. 475.
- - - - - - ſurcharge of. III. 237.
- - - - - -, tenant in, of lands. II. 191. vi.
- - - - - - - - - - - - - chattels perſonal. II. 399.
- - - - - - vouchee. I. 359. xviii, xix.
- - - - - - utterer of falſe money. IV. 100.
- - - - - - ways. II. 35.
- - - - - - without ſtint. II. 34.
Commonalty. I. 403.
Commons, houſe of. I. 158.
Common-wealth, offences againſt. IV. 127.
Commorancy. IV. 273.
Communem legem, writ of entry *ad*. III. 183.
Communion of goods. II. 3.
Commutation of penance. IV. 105. 217. 276.
Compact. I. 45.
Compaſſing the death of the king, *&c*. IV. 76.
Compenſatio. III. 305.
Competent witneſſes. III. 370.
Compoſition, real, for tithes. II. 28.
- - - - - - - - with creditors. II. 484.
Compound larciny. IV. 239.
Compounding felony. IV. 133.
- - - - - - - - - other proſecutions. IV. 136.
Compulſion. IV. 27.
Compurgators. III. 342, 343. IV 368. 414.
Concealment from the crown. IV. 436.
- - - - - - - - of baſtard's death. IV. 198. 358.
Conceſſit, fine *ſur*. II. 353.
Concluſion of deeds. II. 304. i. iii. xii.
- - - - - - - - pleas. III. 303.
Concord in a fine. II. 350. xiv. III. 157.
Condition. II. 299. viii.
- - - - - - -, breach of. II. 281.
- - - - - - -, eſtate on. II. 152.
- - - - - - - in deed. II. 155.
- - - - - - - - law. II. 154. 155.
- - - - - - - of a bond. II. 340. xiii. III. xxviii.
Conditional fees. II. 110.
- - - - - - - pardon. IV. 401.
Confeſs and avoid. III. 310.
Confeſſion by priſoners. IV. 357.
- - - - - - of action. III. 302. 397.
- - - - - - of indictment. IV. 329.
Confeſſio, bill taken *pro*. III. 444, 445.
Confinement to the realm. I. 265.
Confirmation of biſhops. I. 378. 380. IV. 115.
- - - - - - - - - - lands. II. 325.
Confiſcation. I. 299. IV. 377.
Confuſion, property by. II. 405.
Conge d'eſlire. I. 379. 382. IV. 421.
Conies, taking, killing, or ſtealing. IV. 235. 239.
Conjugal rights, reſtitution of. III. 94.
- - - - - - - - - -, ſubtraction of. III. 94.
Conjuration. IV. 60. 436.
Conqueſt, Norman. I. 199. IV. 414, 415.
- - - - - - or acquiſition. II. 48. 242.
- - - - - - - - victory. I. 103. 107.
Conſanguineus frater. II. 232.
Conſanguinity. I. 434. II. 202.
- - - - - - - - -, table of. II. 203.
Conſcience, courts of. III. 81. IV. 441.
Conſecration of biſhops. I. 380. IV. 115.
Conſequential damages, action for. III. 153.
Conſervators of the peace. I. 350. IV. 413. 431.
- - - - - - - - - - truce and ſafe conducts. IV. 69.
Conſideration of contracts. II. 443.
- - - - - - - - - - deeds. II. 296. ii. iv.
Conſideratum eſt per curiam. III. 396.
Conſiliam, or imparlance. IV. 356.
Conſimili caſu, writ of entry *in*. III. 183.

Conſiſtory court. III. 64.
Conſort, queen. I. 219.
Conſpiracy. IV. 136.
- - - - - - -, action of. III. 126.
Conſtable. I. 355. 411. IV. 292.
- - - - - - -, high. I. 116.
- - - - - - -, lord high. I. 355. III. 38. IV. 268.
- - - - - - - - - - - - -, his court. III. 68. IV. 267.
Conſtitution, Engliſh. I. 50. 127. 144. 154. 160. 213. 217. 233. 237. III. 60*. IV. 439.
Conſtruction of deeds and wills. II. 379.
- - - - - - - - - - ſtatutes. I. 87.
Conſtructive treaſon. IV. 75. 85.
Conſuetudinibus et ſervitiis, writ *de*. III. 232.
Conſultation, writ of. III. 114.
Conſummate, tenant by curteſy. II. 128.
Contempt againſt the king. IV. 121.
- - - - - - in courts of equity. III. 443.
- - - - - - law. IV. 283.
Contenement. IV. 379.
Contentious juriſdiction. III. 66.
Conteſtatio litis. III. 297.
Contingent legacy. II. 513.
- - - - - - - remainder. II. 169.
- - - - - - - - - - - - - - - truſtees to ſupport. II. 171. v.
- - - - - - uſes. II. 334.
Continual claim. II. 316. III. 175.
Continuances. III. 316. v. xv. xxix. xxxi. xxxiii.
- - - - - - - with clauſe of *niſi prius*. III. 353.
Continuando in treſpaſs. III. 212.
Contract. II. 442.
- - - - -, action on. III. 117.
- - - - -, expreſs. III. 154.
- - - - -, implied. III. 159.
- - - - - of marriage. I. 439.
- - - - - - - - - - - - -, ſuit for. III. 93.
- - - - -, original, between king and people. I. 233.
Contract, ſimple. II. 465.
Contract, ſpecial. II. 465.
Contractu, action *ex*. III. 117.
Convention of eſtates. I. 151. 152.
- - - - - - - parliaments. I. 152.
Conventional eſtates for life. II. 120.
Converſion. III. 152.
Conveyances. II. 9. 293. 309. IV. 430.
Conviction. IV. 362.
- - - - - - -, ſummary. IV. 280.
Convocation. I. 279.
- - - - - - - -, court of biſhops in. III. 67.
Coparceners. II. 187.
Coppercoin, counterfeiting. IV. 100.
Copy of indictment. IV. 351.
- - - - - - record of indictment. III. 126.
Copyhold. II. 95. 147. IV. 439.
- - - - - - for life. II. 97.
- - - - - -, forfeiture of. II. 284.
- - - - - - not liable to *elegit*. III. 419.
- - - - - - of frank tenure. II. 100. 149.
- - - - - - - - - inheritance. II. 97.
- - - - - - - turned into frank fee. II. 368.
Copyrights. II. 407.
Corn, grain, meal, *&c.* deſtroying, IV. 246.
Corn Rents. II. 322.
Cornage, tenure by. II. 74.
Corody. I. 284. II. 40.
Coronation oath, ancient. I. 236.
- - - - - - - - - - modern. I. 235.
Coronatore eligendo, writ *de*. I. 347.
- - - - - - *exonerando*, writ *de*. I. 348.
Coroner. I. 346. IV. 292. 413.
- - - - -, his court. IV. 274.
Corporate counties. I. 120.
- - - - - - name. I. 474.
Corporation. I. 467. II. 430.
- - - - - - - - act. IV. 58. 439.
- - - - - - - -, courts of. III. 80.
- - - - - - - -, its diſſolution. I. 485.
- - - - - - - - - duties. I. 479.
- - - - - - - - - incidents and powers. I. 477.

Corporation, it's lands, if diſſolved. I. 484. II. 256.
- - - - - - - - - - privileges and diſabilities. I. 476.
Corporeal hereditaments. II. 17.
Corpſe, ſtealing of. II. 429. IV. 235*.
Corpus juris canonici. I. 82.
Corpus juris civilis. I. 81.
Correction, houſe of. IV. 370, 371. 377.
- - - - - - - of apprentices. I. 428.
- - - - - - - - - children. I. 452. 453. IV. 182.
- - - - - - - - - ſcholars. I. 453. IV. 182.
- - - - - - - - - ſervants. I. 428. IV. 182.
- - - - - - - - - wife. I. 444.
Corruption of blood. II. 251. IV. 388. 413. 438. 440.
Corſepreſent. II. 425.
Corſned, trial by. IV. 345. 414.
Coſinage, writ of. III. 186.
Coſts. II. 439. III. 188. 399. xv. xxxi. xxxiii.
- - -, in equity. III. 451.
- - -, no more than damages. III. 400.
- - -, on not going to trial. III. 357.
Covenant. III. 156.
- - - - - in a deed. II. 304. viii. x.
- - - - - real. III. 157.
- - - - - to ſtand ſeiſed to uſes. II. 338.
- - - - -, writ of. II. 350, xiv. III. 157.
Covert-baron. I. 442.
Coverture. I. 442.
Councils of the king. I. 227.
Counſel. III. 26.
- - - - -, action againſt. III. 165.
- - - - -, for priſoners. IV. 355.
- - - - -, king's. III. 27.
- - - - -, when ſilenced. III. 29.
Count. I. 116. 398.
- - - - - in declaration. III. 293. 295.
Counterfeiting the king's coin. IV. 84. 88.
Counterfeiting the king's ſeals. IV. 83. 89.
Counterpart. II. 296.
Country, trial by the. III. 349. IV. 349.
County. I. 116. IV. 411.
- - - - - court. I. 178. 377. III. 35. IV. 411. 414. 416. 420. 422. 424. 441.
- - - - - - - - of Middleſex. III. 82.
- - - - - - palatine, I. 117. IV. 431.
Court. I. 267. III. 23. IV. 258. 414.
- - - baron. II. 90. III. 33. IV. 411.
- - - chriſtian. III. 64.
- - - hand. III. 323.
- - - leet. IV. 273. 411. 424.
- - - martial. I. 416.
- - - power to erect. I. 267. III. 24.
Courts, profits of. I. 289.
Craven. III. 340. IV. 348.
Credible witneſs. III. 370.
Crimes. IV. 1, 2. 5.
Criminal converſation. III. 139.
- - - - - law. IV. 2.
Croſs bills. III. 448.
- - - cauſes. III. 451.
- - - remainder. II. 381.
- - -, ſign of, in deeds. II. 305.
Crown, deſcent of the. I. 191. IV. 413.
- - - - office. IV. 265. 308.
- - - - pleas of the. IV. 2.
Cucking-ſtool. IV. 169.
Cui ante divortium, writ of. III. 183.
Cui in vita, writ of. III. 183.
Cul prit. IV. 339.
Cumberland, theft in. IV. 238.
Curate. I. 393.
- - - - his ſalary. III. 90.
Curator of infants, *&c.* I. 460.
Curatores viarum. I. 358.
Curfeu. IV. 419, 420.
Curialitas. II. 126.
Curſing. IV. 59.
Curteſy, tenant by. II. 126.
Cuſtody of idiots and lunatics. I. 303. III. 427.

Cuſtody of temporalities. I. 282. IV. 421.
Cuſtom. II. 263. 422.
----, aſſurances by. II. 365.
----, dower by. II. 132.
----, general. I. 68. 73.
----, heriot. II. 422.
----, of London, how tried. III. 334.
----, particular. I. 74.
----------, how allowed. I. 78.
----------, when legal. I. 76.
Cuſtomary freehold II. 100. 149.
------ tenant. II. 147.
Cuſtoms on merchandize. I. 314. 316.
Cuſtuma antiqua ſive magna. I. 315.
----- *parva et nova.* I. 315.
Cuſtos rotulorum. I. 349. IV. 272.
Cutpurſes. IV. 242.

D

Damage to things perſonal. III. 152.
Damage-feaſant. III. 6.
Damages. II. 438. III. 187, 188.
Dane lage. I. 65. IV. 412.
Darrein preſentment, aſſiſe of. III. 245.
Date of a deed. II. 304. i. iii. xii, xiii.
Day in bank. III. 277.
---- court. III. 316.
--- of grace. III. 278.
De bene eſſe. III. 383.
De la plus belle, dower. II. 132.
Deacon. I. 388.
Dead man's part. II. 518.
Deadly feud. IV. 244.
Deaf, dumb, and blind. I. 304. II. 497.
Dean and Chapter. I. 382.
Dean, rural. I. 383.
Deanry, rural. I. 112.
Death, appeal of. IV. 314. 424.
----, civil. 132.
----, judgment of. IV. iv.
Debet et detinet, action in. III. 156.
Debt. II. 464. III. 154.
Debt, action of. III. 154. xvi.
----------, on amercement. III. 161.
---------- by law. III. 161*.
---------- eſcape. III. 165.
---------- judgment. III. 160. 421.
---------- penal ſtatutes. III. 161.
----, information of III. 261.
---- public. I. 325. IV. 441.
Debtee executor. III. 18.
Debtor, refuſing to diſcover his effects. IV. 156.
Debts, priority of. II. 511.
Deceit, action for. III. 166.
--------- of. III. 165*. 405.
--------- on the caſe, in nature, of. III. 166*. 405.
Decennary. I. 114. IV. 252.
Deception of the king in his grants. I. 246.
Deciſive oath. III. 342.
Declaration. III. 293. ix. xii. xxvii.
Declaratory part of a law. I. 54.
------- ſtatutes. I. 86.
Declinatory plea. IV. 333. 366.
Decree in equity. III. 451.
Decretals. I. 82.
Decretum Gratiani. I. 82.
Dedimus poteſtatem. I. 352. II. 35*. III. 447.
Deed. II. 295.
Deed-poll. II. 296.
Deeds, ſtealing of. IV. 234.
Deerſtealing. IV. 235. 239.
-------- in diſguiſe. IV. 144.
Default, judgment by. III. 296. 395.
Defeazance, deed of. II. 327. 342.
Defectum, challenge *propter*. III. 362. IV. 352.
Defence. II. xviii. III. 296. iv. vi. xiii. xxviii.
Defendant. III. 25.
Defenſive allegation. III. 100.
Deforcement. III. 172.
Deforciant. II. 350. xv. xvi. III. 174.
Definitive ſentence. III. 101.
Degradation of peers. I. 402.

Degrees, conferred by the archbishop. I. 381.
- - - - - in writs of entry. III. 181.
- - - - - of consanguinity. II. 206.
- - - - - - - - - - - - - - - -, how reckoned. II. 206, 207. 224.
- - - - - guilt. IV. 34.
Dehors, matter. III. 387. IV. 390.
Delay of the law. III. 423.
Delegates, court of. III. 66. 69.
- - - - - - - - - - - -, in academical, causes. III. 85.
Delictum, challenge *propter*. III. 363. IV. 352.
Deliverance, second, writ of. III. 150.
Delivery of a deed. II. 306. iii. xii, xiii.
Demand of lands. II. xviii.
Demandant and tenant. II. xviii.
Demesne lands. II. 90.
Demesnes of the crown. I. 286.
Demi-mark, tender of. III. 5.
Demise of the crown. I. 188. 249.
Demi-vills. I. 115.
Democracy. I. 49.
Demolishing churches, houses, &c. IV. 143.
Demurrer. III. 314. xxx.
- - - - - - book. III. 317.
- - - - - - in equity. III. 446.
- - - - - - to evidence. III. 372.
- - - - - - indictment. IV. 333.
Denial of rent. III. 170.
Denizen. I. 374. II. 249.
Deodand. I. 300.
Departure in pleading. III. 310.
Depopulatio agrorum. IV. 374.
Depositions. III. 383.
- - - - - - - - in chancery. III. 449.
- - - - - - - - - - ecclesiastical courts. III. 100.
Deprivation. I. 393.
Derelict lands. II. 261.
Dereliction of property. II. 9.
Derivative conveyances. II. 324.
Descenaer, writ of *formedon in*. III. 192.
Descent of lands. II. 201. IV. 413. 421.
Descent of the crown. I. 193. IV. 413.
- - - - - - - - - - - -, collateral. I. 194.
- - - - - - - - - - - -, lineal. I. 193.
- - - - - -, rules of. II. 208.
- - - - - -, table of. II. 240.
Desertion. I. 416. IV. 102.
Detainer, forcible. III. 179. IV. 148.
- - - - -, unlawful. III. 151.
Determinable freehold. II. 121.
Determination of will. II. 146.
Detinet, action of debt in. III. 156.
Detinue, action of. III. 152.
Devastation. II. 508.
Devise. II. 373. IV. 430.
Devisee, liable to debts of devisor. II. 378.
Die est fine. III. 316. 399.
Diet, excess in. IV. 171.
Diets. I. 147.
Digests. I. 81.
Dignity of the king. I. 241.
Dignities. II. 37.
Dilapidations. III. 91.
Dilatory pleas. III. 301.
Diminishing the coin. IV. 90.
Diminution of record. IV. 390.
Diocese. I. 111.
Direct prerogatives. I. 239.
Directory part of a law. I. 55.
Disabilities. IV. 377.
Disability, plea to. III. 301.
Disabling a man's limbs or members. IV. 205, 6, 7.
- - - - - - statutes of leases. II. 320. IV. 432.
Disclaimer of tenure. II. 275. III. 233.
Discontinuance of action. III. 296.
- - - - - - - - - - estate. III. 171.
Discovery by bankrupt. II. 483.
- - - - - - of accomplices. IV. 330, 331.
- - - - - - on oath. III. 382. 437.
Discretionary fines and imprisonment. IV. 378.
Disfiguring. IV. 207.
Disguise. IV. 144.
Dismembering, punishment by. IV. 377.

Diſmiſſion of bill in equity. III. 451.
Diſorderly houſes. IV. 167.
- - - - - - perſons. IV. 169.
Diſparagement. II. 70.
Diſpenſation from the king. II. 70.
- - - - - - - - - - - - - pope. IV. 115.
Diſpenſing power of the king. I. 142. 186. 342. IV. 436. 440.
Diſpoſſeſſion. III. 167. 198.
Diſſection of murderers. IV. 202. 377. iv.
Diſſeiſin. II. 195. III. 169.
- - - - - - at the party's election. III. 170, 171.
- - - - - - warranty commencing by. II. 302.
- - - - -, writ of entry *fur*. III. 183.
Diſſenters, proteſtant. IV. 53.
Diſſolution of parliament. I. 188.
Diſtreſs. II. 41, 42. 452. III. 6, 7.
- - - - - - exceſſive. III. 12.
- - - - - - illegal, for crown debts. IV. 423.
- - - - - - infinite. III. 231. 280. IV. 285. 318.
- - - - - -, ſale of. III. 14.
- - - - - -, ſecond. III. 12.
Diſtribution of inteſtate's effects. II. 515. IV. 408. 424. 439.
Diſtringas in chancery. III. 445.
- - - - - - - detinue. III. 413.
- - - - - *juratores*. III. 354.
- - - - - to compel appearance. III. 280. xvii.
Diſturbance. III. 236.
- - - - - - - - of common. III 237.
- - - - - - - - - franchiſes. III. 236.
- - - - - - - - - patronage. III. 242.
- - - - - - - - - religious aſſemblies. IV. 54.
- - - - - - - - - tenure. III. 242.
- - - - - - - - - ways. III. 241.
Diſturber. II. 278.
Diverſity of perſon, plea of. IV. 396.
Dividend of bankrupt's effects. II. 487.
Divine law. I. 42.
Divine right of kings. I. 191. IV. 436.
- - - - - - - - - tithes. II. 25.
- - - - ſervice, tenure by. II. 102.
Divorce. I. 440. III. 94.
Do, ut des. II. 444.
- - - - *facias*. II. 445.
Docquet of judgment. II. 511. III. 397.
Doctrines, illegal, aſſerting or publiſhing. I. 160. 208. 217. IV. 91. 116. 123.
Dog, carrying. IV. 123.
Dogs, ſtealing them. IV. 235*.
- - - -, &c. owner anſwerable for. III. 153.
Domebook of Alfred. I. 64. IV. 411.
Domeſday-book. II. 49. 99. III. 331.
Dominion. II. 1.
Domitae naturae, animals. II. 390.
Donatio mortis cauſa. II. 514.
Donative advowſons. II. 23.
Done, grant, et render, fine *fur*. II. 353.
Donis, ſtatute *de*. II. 112.
Double fine. II. 353.
- - - - plea. III. 308.
- - - - voucher. II. xvii.
Dowager, princeſs. IV. 81.
- - - - - -, queen. I. 224. IV. 81.
Dower. II. 129. IV. 424.
- - - - *ad oſtium eccleſiae*. II. 132.
- - - - aſſignment of. II. 135.
- - - - bar of. II. 136.
- - - - by common law. II. 132.
- - - - - cuſtom. II. 132.
- - - - *de la plus belle*. II. 132.
- - - - *ex aſſenſu patris*. II. 133.
- - - - juſtices of. III. 59.
- - - - *unde nihil habet*, writ of. III. 183.
- - - -, writ of right of. III. 183. 194.
Draught for money. II. 467.
Drawbacks. I. 315.
Drawing to the gallows. IV. 92. 377.
Droit droit. II. 199.
Druids, their cuſtoms. I. 63. IV. 408.
Drunkenneſs. IV. 25. 64.

Duchy court of Lancaſter. III. 78.
Ducking-ſtool. IV. 169. 377.
Duel. IV. 145. 185. 199.
Dues, eccleſiaſtical, non-payment of. III. 89.
Dukes. I. 397, 409.
Dum fuit intra aetatem, writ of. III. 183.
- - - - - *non compos mentis*, writ of. III. 183.
Duodecima manus. III. 343.
Duplex querela. III. 247.
Duplicatio. III. 310.
Duplicity in pleading. III. 308. 311.
Durante abſentia, adminiſtration. II. 503.
- - - - - *minore aetate*, adminiſtration. II. 503.
Dureſs. II. 292.
- - - - of impriſonment. I. 131. 136.
- - - *per minas*. I. 131. IV. 30.
Durham, county palatine of. I. 117.
- - - - -, courts of. III. 78.
Duties of perſons. I. 123.
- - - - - - the king. I. 233.
Dwelling-houſe. IV. 224.

E

Ealdormen. I. 398.
Ear, loſs of. IV. 146. 157. 159*. 206. 248. 377.
Earl. I. 116. 398.
Earl marſhal, his court. III. 68. IV. 267.
Earneſt. II. 447.
Eat inde ſine die. III. 316. 399.
Eaves-droppers. IV. 168.
Eccleſiaſtical corporations. I. 470.
- - - - - - - - courts. III. 61.
- - - - - - - - - - - - -, their cognizance. III. 87. IV. 275. 425.
- - - - - - - - - - - -, when ſeparated from the civil. III. 62. IV. 415. 421.
Education of children. I. 450.
Edgar, king, his laws. I. 66. IV. 412.
Edward the confeſſor, his laws. I. 66. IV. 412. 420.
Egyptians. IV. 165.
Ejectione firmae, writ of. III. 199.
Ejectment, action of. III. 199. ix. IV. 441.
Election of biſhops. I. 37. IV. 115. 421.
- - - - - - - magiſtrates. I. 340. IV. 413. 427.
- - - - - - - - members of parliament. I. 170. 177.
- - - - - - - Scots peers. I. 169. IV. 116.
Elective monarchy. I. 192. IV. 413.
Eleemoſynary corporations. I. 471.
Elegit, eſtate by. II. 161.
- - - -, writ of. III. 418. IV. 426.
Eliſors. III. 355.
Eloignment. III. 129. 149.
Elopement. I. 442. II. 130.
Ely, courts of. III. 78.
- - -, iſle of. I. 120.
Embargo. I. 270.
Embaſſadors. I. 253.
- - - - - - - -, killing them. IV. 85.
- - - - - - - -, violation of their privileges. IV. 70. 441.
Emblements. II. 122. 145. 403.
Embowelling alive. IV. 92. 377.
Embracery. IV. 140.
Emperor, his authority. I. 242.
Emphyteuſis. III. 232.
Empſon and Dudley. IV. 310.
Enabling ſtatute of leaſes. II. 319.
Encloſure, diſſeiſin by. III. 170.
Endowment of vicarages. I. 387.
- - - - - - - - - widows. II. 135.
Enemies. I. 257. IV. 83.
- - - - - - goods. II. 401.
England. I. 111.
Engleſchire. IV. 195.
Engliſh, law proceedings in. III. 323. IV. 441.
Engroſſing. IV. 160.
Enlarger l'eſtate. II. 324.

Enlarging ſtatute. I. 87.
Enquiry, writ of. III. 398.
Enſeint. II. 169.
Entails. II. 112. IV. 427. 431.
Entries, books of. III. 271.
Entry. III. 5. 174.
---- forcible. III. 179. IV. 148.
---- on lands. II. 312.
---- tolled by deſcent. III. 176, 177.
----, writ of. II. xvii. III. 180.
Equity. I. 61. 91. III. 50. 429.
---- and law, courts of, how diſtinguiſhed. III. 429. 436. IV. 442.
---- courts, hiſtory of. III. 50. IV. 430.
---------- practice of. III. 442.
--- of redemption. II. 159.
---- ſtatutes. III. 431.
--- reſerved. III. 453.
--- ſide of the chancery. III. 50.
---------- exchequer. III. 45.
Eriarch. IV. 313.
Error, coſts in. III. 400. 410. xxxii.
----, writ of. III. 407. xxvii. IV. 391.
----------, where proſecuted. III. 410, 411. IV. 391.
Eſcape. III. 290. 415. IV. 129.
----, action for. III. 165.
----, aſſiſting in. IV. 131.
Eſcheat. I. 303. II. 11. 72. 89. 244. IV. 388. 413. 418.
----, writ of. III. 194.
Eſcrow. II. 307.
Eſcuage. II. 74. IV. 422.
Eſplees. II. xviii. III. iv.
Eſquire. I. 406.
Eſſoign. III. 277.
---- day of the term. III. 278.
Eſtate in lands. II. 103.
Eſtates of the kingdom. I. 156.
Eſtoppel. II. 295. 308.
Eſtoveriis habendis, writ *de*. I. 441.
Eſtovers of a wife. I. 441.
---- common of. II. 35.
Eſtrays. I. 297. II. 14.
Eſtreat of recogizance, *&c.* IV. 253.
Eſtrepement, writ of. III. 225.
Evidence. III. 367. IV. 356.
Ex officio informations. IV. 308.
Ex poſt facto laws. I. 46.
Examination in chancery. III. 449.
-------- of bankrupt. II. 481.
-------- priſoners. IV. 296.
-------- witneſſes. III. 372.
-------, trial by. III. 331.
Exceptio. III. 310.
Exceptions, bill of. III. 372.
-------- to anſwer in chancery. III. 448.
Exchange, bill of. II. 466.
------, deed of. II. 323.
------ of goods and chattels. II. 446.
------ lands. II. 322.
Exchequer chamber, court of. III. 56.
-------, court of. III. 44.
-------, receipt of. III. 44.
Exciſe. I. 319.
----, hereditary. I. 288.
----, offences againſt, how tried. IV. 281
Excluſion bill. I. 210.
Excommunication. III. 101.
Excommunicato capiendo, writ *de*. III. 102.
---------- *deliberando*, writ *de*. III. 102.
Excuſable homicide. IV. 182.
Executed contract. II. 443.
------ eſtate. II. 163.
------ fine. II. 353.
------ remainder. II. 168.
Execution, civil. III. 412. xxiii.
-------, criminal. IV. 403.
-------------- award of. IV. 263. vi.
---------------, plea in bar of. IV. 396.
---------------, precept of. IV. 403.
---------------, rule for. IV. 404.
---------------, varying from judgment. IV. 179. 404.

Execution, criminal, warrant of. IV. 404. vi.
- - - - - - - - - - - - -, writ of. IV. 403. vii.
- - - - - of deviſes. II. 376.
- - - - - - - uſes. II. 333.
- - - - -, proceſs of. III. 279, 410.
Executive power. I. 190.
Executor. II. 503.
- - - - - *de ſon tort*. II. 507.
- - - - - of executor. II. 506.
- - - - - - - his own wrong. II. 507.
Executory contract. II. 443.
- - - - - deviſe. II. 173. 334.
- - - - - eſtate. II. 163.
- - - - - remainder. II. 169.
Exemplification. II. xvii.
Exemptions from tithes. II. 28.
Exigent, writ of. III. 283. IV. 319.
Exigi facias, writ of. III. 283. xix. IV. 319.
Exile. I. 137. IV. 377.
Expectancy, eſtates in. II. 163.
Expenſes of proſecution. IV. 362.
- - - - - - witneſſes. III. 369. IV. 362.
Exportation of wool, *&c.* IV. 154. 428.
Expreſs condition. II. 154.
- - - - contract. II. 443. III. 154.
- - - - malice. IV. 198.
- - - - warranty. II. 301.
Extendi facias. III. 420.
Extent, writ of. III. 420.
Extinguiſhment of eſtates. II. 325.
Extortion. IV. 141.
Extraparochial places. I. 114.
- - - - - - - - tithes. I. 284.
Extravagants. I. 82.
Eye, putting out. IV. 206, 207.
Eyre, chief juſtice in. III. 72.
- - -, juſtices in. III. 58. IV. 422, 423.
- - - - - - - -, killing them. IV. 84.

F

Facio ut des. II. 445.
- - - - *facias*. II. 444.
Facto, king *de*. I. 204. 370. IV. 77.
Factor. I. 427.
Factorſhip, cognizable in equity. III. 437.
Fair. I. 274. III. 218.
Falſe impriſonment. III. 127. IV. 218.
- - - - - - - - - - -, action of. III. 138.
- - - judgment, writ of. III. 34. 407.
- - - news. IV. 149.
- - - return, action for. III. 111. 163.
- - - verdict. III. 402. IV. 140.
- - - weights and meaſures. IV. 157.
Falſi crimen. IV. 89. 134. 156. 247.
Falſifying attainder. IV. 390.
- - - - - coin. IV. 84. 88. 90. 98.
- - - - - judgment. IV. 390.
Fame, good or ill. IV. 256. 299.
Farm. II. 318.
Farrier, common, action againſt. III. 165.
Favour. challenge to. III. 363.
Fealty. I. 367.
- - - -, oath of. II. 45. 53. 86.
Fear, putting in. IV. 242.
Fee. II. 45. 104. 106.
- - - after a fee. II. 334.
- - -, eccleſiaſtical. III. 90.
- - - farm rent. II. 43.
- - - ſimple. II. 104. i. vi.
- - - tail. II. 112. vi.
Fees to council. III. 28.
Feigned iſſue. III. 452.
Felo de ſe. II. 499, IV. 189.
Felon. II. 499.
Felonious homicide. IV. 188.
Felony. II. 284. IV. 94.
- - - -, appeal of. IV. 310.
- - - -, compounding of. IV. 134.
- - - -, miſpriſion of. IV. 121.
- - - -, puniſhment of. IV. 98. 216. 222.
Feme covert. I. 442. II. 292. 497.
Feodal actions. III. 117.
- - - - tenures. II. 44. 425. 431.
- - - - - - - - among the Saxons. IV. 413.
- - - - - - - - -, when received in England. II. 48. IV. 413. 418.

Feoffment. II. 310. i.
Feorm. II. 318.
Ferae naturae, animals. II. 390.
Ferry. III. 219.
Fetters. IV. 300. 322.
Feud. II. 45.
Feudatory. II. 53.
Feudum antiquum. II. 212. 221.
- - - - - *apertum*. II. 245.
- - - - - *honorarium*. II. 56. 215.
- - - - - *improprium*. II. 58.
- - - - - *individuum*. II. 215.
- - - - - *maternum*. II. 212. 243.
- - - - *novum*. II. 212. 221.
- - - - - - - - -, held *ut antiquum*. II. 212. 221.
- - - - - *paternum*. II. 243.
- - - - *proprium*. II. 58.
Fiction in law. III. 43. 107.
Fictitious plaintiff. IV. 134.
Fidei commissum. II. 327.
Fidejussors. III. 108. 291.
Fief. II. 45.
- - - *d'haubert*. II. 62.
Fieri facias, writ of. III. 417. xxxiv.
- - - *feci*. III. xxxv.
Fifteenths. I. 309.
Filial portion. II. 519.
Final decree. III. 452.
- - - judgment. III. 398.
Finding of indictments. IV. 305.
- - - - - - - - things personal. II. 9.
Fine for alienation. II. 71. 89.
- - - - - endowment. II. 135.
- - - - - misdemesnors. IV. 377, 378.
- - - - in copyhold. II. 98.
- - - - of lands. II. 118. 348. III. 157. 174. IV. 426. 429.
- - - - - - - - - executed. II. 353.
- - - - -, reversal of, when levied of copyholds. II. 368. III. 166*.
- - - - *sur done, grant, et render*. II. 353.
- - - - - - - - *cognizance de droit, come ceo, &c.* II. 352. xiv.
Fine *sur cognizance de droit tantum*. II. 353.
- - - - - - - - *concessit*. II. 353.
Fines and forfeitures, when grantable. III. 259. IV. 379.
Finger, disabling. IV. 206.
Fire, negligence of. I. 431. IV. 222.
Fire-bote. II. 35.
Fire-ordeal. IV. 342.
Fire-works. IV. 168.
First-fruits. I. 284. II. 67. IV. 107.
Fish, royal. I. 223. 290.
- - - - -, stealing in disguise. IV. 144. 236.
- - - - - - - -, or attempting to steal. IV. 236.
Fishery, common of. II. 34.
- - - - - -, free. II. 39. 417. IV. 424.
- - - - - -, several. II. 39.
Fishpond, destroying. IV. 246.
Fitzherbert. I. 72. III. 183.
Fleets. I. 262. IV. 419.
Fleta. I. 72. IV. 427.
Flight. IV. 387.
Flotsam. I. 293. III. 106.
Foenus nauticum. II. 459.
Folk land. II. 90. 92.
Foot of a fine. II. 351. xv.
Force, injuries with and without. III. 118.
- - - -, when repellable by death. IV. 181.
Forcible abduction and marriage. IV. 208.
- - - - -, entry and detainer. III. 179. IV. 148.
Foreclosure. II. 159.
Foreign bill of exchange. II. 467.
- - - - - - coin, forging it. IV. 89. 99. 120.
- - - - - - county, indictment in. IV. 303.
- - - - - - dominions. I. 110.
- - - - - - prince, pension from. IV. 122.
- - - - - - service. IV. 100.
Forest. I. 289. II. 14. 38. 414.
- - - - - courts. III. 71.
Forest laws. II. 416. III. 73. IV. 415. 420, 421. 423. 432. 437.

Foresta,

Foreſta, carta de. IV. 423. 425.
Foreſtaller, diſſeiſin by. II. 170.
Foreſtalling. IV. 159.
Foretooth, ſtriking out. IV. 206.
Forfeiture. I. 299. II. 153. 267.
- - - - - - - for crimes. IV. 377. 381. 423, 424.
- - - - - - - of copyholds. II. 284.
- - - - - - - - - goods and chattels. II. 420. IV. 386.
- - - - - - - - lands. II. 267. IV. 381.
Forgery. IV. 247.
Forgiveneſs by the proſecutor. IV. 364.
Forma pauperis. III. 400.
Formedon, writ of. III. 191.
Forms of law, unalterable. I. 142.
Fornication. IV. 64.
Forts and caſtles. I. 263.
Fortune tellers. IV. 62.
Forty days court. III. 71.
Founder of a corporation. I. 480.
Foundling hoſpitals. I. 131.
Franchiſe. II. 37.
- - - - - - -, allowance of. III. 263.
- - - - - - -, diſturbance of. III. 236.
- - - - - - -, royal. I. 302.
Frankalmoign. II. 101.
Franked letters. I. 324.
Frank-fee. II. 368. III. 166*.
Frankmarriage. II. 115.
Frankpledge. I. 114. IV. 252.
- - - - - - - - -, view of. IV. 273.
Frank-tenement. II. 104.
- - - - tenure. II. 61.
Frater conſanguineus. II. 232.
- - - - *uterinus.* II. 232.
Fraud, civil, where cognizable. III. 431. 437. 439.
- - - - -, criminal. IV. 158.
Frauds and perjuries, ſtatute of. I. 418. II. 161. 243. 259. 297. 306. 337. 342. 364. 376. 448. 466. 500, 501. 515. III. 159. 420. IV. 439.
Fraudulent deeds. II. 296.
- - - - - - - - deviſes. II. 378.
Fraunk-ferme. II. 80.
Free bench. II. 122.
Free fiſhery. II. 39. 417.
- - - ſervices. II. 60.
- - - ſocage. II. 79.
- - - warren. II. 38. 417. IV. 415.
Freehold. II. 104.
- - - - - - - - leaſes. II. 120. 318.
Freſh ſuit. I. 297.
Fruit, ſtealing of. IV. 233.
Full age. I. 463.
Fumage. I. 325.
Funds, public. I. 331.
Funeral expenſes. II. 508.
Furandi animus. IV. 230. 232.
Futuro, freehold *in*. II. 144. 165.

G

Gage. III. 280. iv.
- - - -, eſtates in. II. 157.
Game. II. 14. 395. 403. 410. IV. 415.
- - - -, deſtroying of. IV. 174.
- - - -, laws. IV. 174. 416.
- - - -, ſelling of. IV. 175.
Gaming. IV. 171.
Gaming-houſes. IV. 167. 171.
Gaol-delivery. IV. 270. iii.
- - - - diſtemper. I. 346.
Gaolers. I. 436. IV. 300.
- - - - -, compelling priſoners to be approvers, *&c.* IV. 128.
Gardens, robbing of. IV. 233.
Garter, knight of. I. 403.
Gavelkind. I. 74. II. 84. IV. 409. 413.
Geñeral demurrer. III. 315.
- - - - - fund. I. 331.
- - - - - imparlance. III. 301.
- - - - - iſſue. III. 305. IV. 338.
- - - - - legacy. II. 512.
- - - - - occupancy. II. 258.
- - - - - ſeſſions. IV. 272.
- - - - - ſtatute. I. 85.
- - - - - tail. II. 113. vi.
- - - - - verdict. III. 378. IV. 354.
- - - - - warrant. IV. 291.
Gentlemen. I. 405, 406.
Gift of chattels, perſonal. II. 441.

Gift of chattels real. II. 440.
- - - - - lands and tenements. II. 316.
Gilda mercatoria. I. 473.
Glanvil. I. 72. IV. 421.
Gleaning. III. 212.
God and religion, offences againſt. IV. 43.
Good behaviour, ſecurity for. IV. 251. 256.
- - - - - conſideration. II. 297.
Government, contempts againſt. IV. 123.
- - - - - - - -, it's original. I. 48.
Grand aſſiſe. III. 341. 351. vi. IV. 422.
- - - - - *Couſtumier* of Normandy. I. 107.
- - - - - juror, diſcloſing evidence. IV. 126.
- - - - - jury. IV. 302. ii.
- - - - - - - - in attaint. III. 351. 404.
- - - - - larciny. IV. 229.
- - - - - ſerjeantcy. II. 73.
Grants. II. 9.
- - - - - of chattels perſonal. II. 441.
- - - - - - - - - - - - real. II. 440.
- - - - - - - lands and tenements. II. 317.
- - - - - - - the king. II. 346.
Great council. I. 147.
- - - - ſeal of the king. II. 346. III. 47.
- - - - - - - - - - - - - -, counterfeiting it. IV. 83.
- - - - tithes I. 388.
Gregorian code. I. 81.
Groſs, advowſon in. II. 22.
- - - -, common in. II. 34.
- - - -, villein in. II. 93.
Guardian *ad litem.* III. 427.
- - - - - - and ward. I. 460.
- - - - - - at common law. I. 461.
- - - - - - by cuſtom. I. 462.
- - - - - - - - nature. I. 461.
- - - - - - - - ſtatute. I. 462.
- - - - - - for nurture. I. 461.
- - - - - - in chivalry. I. 462. II. 67.
- - - - - - - - ſocage. II. 88.
Guardian, teſtamentary. I. 462.
Guernſey, iſland of. I. 107.
Gunpowder, hindering it's importation. IV. 116.
- - - - - - - -, keeping or carrying it illegally. IV. 168.
Gypſies. IV. 165.

H

Habeas corpora juratorum. III. 354.
- - - - - *corpus.* I. 135.
- - - - - - - - - - act. I. 128. III. 135. IV. 438.
- - - - - - - - - - - - *ad deliberandum.* III. 130.
- - - - - - - - - - - - - - *faciendum et recipiendum.* III. 130.
- - - - - - - - - - - - - *proſequendum.* III. 130.
- - - - - - - - - - - - - *reſpondendum.* III. 129.
- - - - - - - - - - - - - *ſatisfaciendum.* III. 130.
- - - - - - - - - - - - - *ſubjiciendum.* III. 131.
- - - - - - - - - - - - - *teſtificandum.* III. 130.
- - - - - - - - *cum cauſa.* III. 77.
Habendum of a deed. II. 298. i, ii. v.
Habere facias poſſeſſionem. III. 412.
- - - - - - - - - *ſeiſinam.* III. 412.
Habitation, offences againſt. IV. 220.
- - - - - - - -, property in. II. 4.
Hackney coaches and chairs. I. 327.
Hereditas jacens. II. 259.
Heretico comburendo, writ *de.* IV. 46. 439.
Half blood. I. 194. II. 227.
Hame-ſecken. IV. 223.
Hamlet. I. 115.
Hanaper office. III. 49.
Hand, burning in. IV. 367. 369. 371. 377. iv.
- - - -, diſabling. IV. 206.
- - - -, holding up. IV. 323.
- - - -, loſs of. IV. 125. 154. 276. 377.

Hand ſale. II. 448.
---- writing, ſimilitude of. IV. 358.
Hanging. IV. 376.
Hanover. I. 110.
Hares, ſtealing them. IV. 239.
Havens. I. 264.
Hawks, ſtealing of. IV. 236.
Hay-bote. II. 35.
Head of the church. I. 279. IV. 430.
Headborough. I. 115.
Health. I. 124.
----, injuries to. III. 122.
----, offences againſt public. IV. 161.
Hearing in equity. III. 451.
Hearſay evidence. III. 368.
Hearth-money. I. 326.
Hedge-bote. II. 35.
Hedge-ſtealing. IV. 233.
Heir. II. 201.
---apparent and preſumptive. II. 208.
Heireſs, ſtealing of. IV. 208.
Heir-looms, II. 427.
Helping to ſtolen goods for reward. IV. 132.
Hengham. I. 72. III. 409. IV. 427.
Henry I. his laws. IV. 420.
Heptarchy, Saxon. IV. 410.
Heraldry. III. 105.
Heralds. III. 105.
----- books. III. 105.
Hereditaments. II. 17.
Hereditary right to the crown. I. 191. 209.
Herefy. IV. 44.
Heretable juriſdictions. II. 77.
Heretochs. I. 397. 409. IV. 413.
Heriots. II. 97. 422.
-----, ſeiſing of. III. 15.
Hermogenian code. I. 81.
High commiſſion court. III. 67. IV. 42. 433. 439.
----conſtable. I. 355.
----------of England. I. 355. IV. 268.
----------, his court. III. 68. IV. 267.
High miſdemeſnors. IV. 121.
----ſteward of Great Britain, his court. IV. 261. 348.
----------, in parliament. IV. 260. 263.
----------Oxford, his court. IV. 277.
----treaſon. IV. 75.
---------, trials in. IV. 351. 440.
Highways. I. 357. II. 35.
-------, annoyances in. IV. 167.
-------, robbery in or near IV. 243.
Hiring. II. 453.
Hiſtory of the law. IV. 407.
Hogs, keeping them in towns. IV. 167.
Holding over. II. 151. III. 210. 211.
Homage. II. 53.
------auncеſtrel. II. 300.
------by biſhops. I. 284. 379. IV. 421.
------liege. I. 367.
------of a court baron. II. 91.
------ſimple. I. 367.
Homicide. IV. 177.
Homine replegiando, writ *de*. III. 129.
Honorary feuds. II. 56. 215.
Honoris reſpectum, challenge *propter*. III. 261. IV. 352.
Honour, court of. III. 104.
------of a peer. I. 402.
------, or dignity. I. 271.
------, ſeignory. II. 91.
Hop-binds, deſtroying. IV. 246.
Horſe-races. IV. 173.
Horſe-ſtealing. IV. 238.
Horſes, ſale of. II. 450.
Hoſpitals. I. 471. 474.
-------, their viſitors. I. 482.
Hotchpot. II. 190. 517.
Houſe, immunities of. IV. 223.
----, larciny from. IV. 240.
Houſe-bote. II. 35.
Houſe-tax. I. 325, 326.
Hue and cry. IV. 293.
Hundred. I. 116. IV. 411.

Hundred, action against, for robbery, &c. III. 160. IV. 246. 293.
Hundred court. III. 34. IV. 411.
Hundredors, challenge for defect of. III. 359. IV. 352.
Hunger. IV. 31.
Hunting. III. 213.
- - - - - - by inferior tradesmen. III. 215. 401.
- - - - - - - - night or in disguise. IV. 143, 144.
Hurdle. IV. 92. 377.
Husband and wife. I. 433. IV. 28.
- - - - - - injuries to. III. 139.
Hustings, court of, in London. III. 80.
Hydage. I. 311.
Hypotheca. II. 159.

J I

Jactitation of marriage. III. 93.
Identity of person. IV. 396.
Idiot. I. 303. II. 291. IV. 24.
- - - -, cognizance of. III. 427.
- - - -, inspection of. III. 332.
- - - -, marriage of. I. 438.
Idiota inquirendo, writ *de*. I. 104.
Idleness. IV. 169.
Jeofails. III. 407. IV. 375. 439.
Jersey, island of. I. 106.
Jetsam. I. 293. III. 106.
Jews. I. 375. IV. 373.
- - - -, children of. I. 449.
Ignominious punishments. IV. 377.
Ignoramus. IV. 305.
Ignorance. IV. 27.
Illegal conditions. II. 156.
Imagining the king's death. IV. 76.
Imbezzling king's armour or stores. IV. 101.
- - - - - - - public money. IV. 121.
- - - - - - - records. IV. 128.
Immediate descent. II. 226.
- - - - - - - states of the empire. II. 60.
Imparlance. II. xix. III. 299. 301. xxix.
Impeachment in parliament. IV. 259.
- - - - - - - - - of waste. II. 283. v.
Imperial chamber. III. 39.
- - - - - - constitutions. I. 80.
- - - - - - crown and dignity. I. 242.
Impediments of marriage. I. 434.
Implication. II. 381.
Implied condition. II. 152.
- - - - - - contract. II. 443. III. 159.
- - - - - - malice. IV. 200.
- - - - - - warranty. II. 300.
Importing *agnus dei*, crosses, &c. IV. 115.
- - - - - - - counterfeit money. IV. 84. 89.
Impossible condition. II. 156.
Impostures, religious. IV. 62.
Impotency. I. 434.
Impotentiae, property *ratione*. II. 394.
Impressing seamen. I. 420.
Imprisonment. I. 134. 136. IV. 377. 436.
- - - - - - - - - - beyond sea. I. 137. IV. 116.
- - - - - - - - - -, false. III. 127. IV. 218.
Improper feuds. II. 58.
Impropriations. I. 386.
Incapacities. IV. 377.
Incendiaries. IV. 220.
Incest. IV. 64.
Inchantment. IV. 60.
Incidental prerogatives. I. 240.
Inclosures, destroying. IV. 247.
Incomplete judgments. III. 397.
Incorporation, power of. I. 472. 474.
Incorporeal hereditaments. II. 20.
Incorrigible roguery. IV. 169.
Incumbent. I. 392.
Incumbrances, covenant against. II. x.
Indebitatus assumpsit. III. 155.
Indefeasible right to the throne. I. 195.
Indentures II. 295.
- - - - - - - of a fine. II. 351. xv.
India, misdemesnors in. IV. 305.
Indicavit, writ of. III. 91.
Indictable, what. IV. 218.

Indictment. IV. 302. ii.
- - - - - -, copy of. III. 126. IV. 351.
- - - - - -, locality of. IV. 303.
Individuals, offences againſt. IV. 176.
Indorſement of bills and notes. II. 468. IV. 441.
Induction to a benefice. I. 391. II. 312. IV. 107.
Induſtriam, property *per*. II. 391.
Infamous witneſs. III. 370.
Infant. I. 463. II. 292. 462. 497. IV. 22.
- - - -, carnal knowledge of. IV. 212.
- - - -, cognizance of. III. 427.
- - - -, evidence by. IV. 214.
- - - -, inſpection of. III. 332.
- - - -, *in ventre ſa mere*. I. 129, 130. II. 169.
- - - -, privileges and diſabilities of. I. 464.
Infeodations of tithes. II. 27.
Influence on elections to parliament. I. 178.
Information, compounding of. IV. 135.
- - - - - - -, criminal. IV. 308. 429. 436.
- - - - - - -, *ex officio*. III. 427. IV. 308.
- - - - - - -, for charities. III. 427.
- - - - - - -, in crown office. IV. 308.
- - - - - - - -, eccleſiaſtical courts. III. 101.
- - - - - - -, exchequer. III. 261.
- - - - - - -, nature of *quo warranto*. IV. 312. 441.
- - - - - - - - *rem*. III. 262.
- - - - - - - of ſuperſtitious uſes. III. 428.
Informer, common. II. 437. III. 161. IV. 308.
Infortunium, homicide *per*. IV. 182.
Inheritable blood. II. 246.
Inheritance. II. 11. 201.
- - - - - -, canons of. II. 208.
- - - - - -, eſtates of. II. 104.
Initiate, tenant by courteſy. II. 127.
Injunction in equity. III. 443.
Injuries, civil. III. 2.
- - - -, with and without force. III. 118.
Inland bill of exchange. II. 467.
Inmates. IV. 168.
Inn of court and chancery. I. 23. 25.
Innkeeper, action againſt. III. 165. 166.
Inns, diſorderly. IV. 167.
Innuendo. III. 126.
Inofficious teſtament. I. 447. II. 502.
Inqueſt of office. III. 258. IV. 301. 424.
Inquiſitio poſt mortem. II. 68. III. 258.
Inſidiatio viarum. IV. 374.
Inſimul computaſſent. III. 164.
Inſolvency, act of. II. 484.
Inſolvent debtors. II. 484. III. 416.
Inſpection, trial by. III. 331.
Inſtallment. II. 312.
Inſtanter. trial. IV. 396. v.
Inſtitutes of Juſtinian. I. 81.
Inſtitution to a benefice. I. 390. II. 23. IV. 107.
Inſurance. II. 458. III. 74. IV. 441.
Interdictum. III. 442.
Intereſſe Termini. II. 134.
Intereſt of money. II. 454.
- - - - on bankrupt's debts. II. 488.
- - - - - - legacies. II. 514.
- - - - or no intereſt, inſurance. II. 459, 460.
Intereſted witneſs. III. 370.
Interlineation in a deed. II. 308.
Interlocutory decree in eccleſiaſtical courts. III. 101.
- - - - - - - - - - - - chancery. III. 452.
- - - - - - - - judgment. III. 448.
Interpleader, bill of. III. 448.
Interpretation of laws. I. 58.
Interregnum. I. 196. 249.
Interrogatories, examination on. III. 383. 438. IV. 287.
- - - - - - - - in chancery. III. 449.
Inteſtacy. II. 494.
Inteſtates, their debts and effects. IV. 425. 428.

Intruſion,

Intrusion, information of. III. 261.
- - - - - on freehold. III. 169.
- - - - - writ of. III. 183.
Inventory of deceased's effects. II. 510.
Investiture. II. 209.
- - - - - - of benefices. II. 23.
- - - - - - - - feuds. II. 53.
- - - - - - - - lands. II. 311.
Involuntary manslaughter. IV. 192.
John, king, his resignation of the crown to the pope. IV. 107. 111.
Joinder in demurrer. III. 315. xxx.
- - - - of battel. III. v.
- - - - - issue. III. 315. xiii. IV. 340. iii.
Joint-tenancy in lands. II. 180.
- - - - - - - - - things personal. II. 399.
Joint-tenant, king cannot be. II. 409.
Jointure. II. 137. 180. v.
Ireland. I. 99.
Iron, stealing. IV. 233.
Irons, to secure prisoners. IV. 300. 322.
Islands. II. 261.
Issuable terms. III. 353.
Issue at law. III. 313, 314.
- - -, collateral. IV. 396. v.
- - -, feigned. III. 452.
- - - in criminal cases. IV. 399. iii. v.
- - - - equity. III. 448.
- - - -, joinder of. III. 315. xiii. IV. 340. iii.
- - -, tender of. III. 313.
Issues on a *distringas*. III. 280.
Itinerant courts. IV. 411. 422.
- - - - - justices. III. 59. IV. 422.
Judges. I. 267. III. 25. IV. 440.
- - - -, assaulting them. IV. 125.
- - - -, how counsel for prisoners. IV. 355.
- - - -, killing them, IV. 84.
- - - -, their commissions. I. 267.
- - - -, threatening or reproaching them. IV. 126.
Judgment. II. xix. III. 395. vi. viii. xv. xxxi. xxxiii.
Judgment, action on. III. 160. 421.
- - - - - - -, in criminal cases. IV. 375. iv.
- - - - - -, property by. II. 436.
- - - - - -, relieved against in equity. III. 437.
Judices ordinarii. III. 315.
Judicial power. I. 267. 269.
- - - - - writs. III. 282.
Judicium Dei. IV. 341, 342.
- - - - - *ferri, aquae, et ignis*, IV. 344.
- - - - - *parium*. III. 350.
Jure divino, right to the throne. I. 191.
- - - - - - - - - - - - - - - - tithes. II. 25.
Jure, king *de*. I. 204. IV. 77.
Juris utrum, writ of. III. 252.
Jurisdiction, encroachment of. III. 111.
- - - - - - - - - of courts, settled by Edw. I. 425. 426.
- - - - - - - -, plea to. III. 301. IV. 333.
Jurors, fining or imprisoning. IV. 361.
Jury, trial by. III. 349. IV. 349. 414. 441.
Jus accrescendi. II. 184. v.
- - - *ad rem*. II. 312.
- - - *duplicatum*. II. 199.
- - - *fiduciarium*. II. 328.
- - - *imaginum*. I. 406.
- - - *in re*. II. 312.
- - - *legitimum*. II. 328.
- - - *patronatus*. III. 246.
- - - *praetorium*. III. 50.
- - - *precarium*. II. 328.
Justice, free course of. I. 141.
- - - -, homicide in advancement of. IV. 179.
- - - -, king the fountain of. I. 266.
- - - -, neglect or refusal of. III. 109.
- - - -, offences against. IV. 128.
Justice-seat, court of. III. 72.
Justicies, writ of. III. 36.
Justifiable homicide. IV. 178.

Juſtification, ſpecial. III. 306.
Juſtifying bail. III. 291.

K

Keeper, lord. III. 47.
Kidnapping. IV. 219.
Killing, what amounts to homicide. IV. 196.
Kindred, how numerous. II. 205.
King. I. 190.
---- can do no wrong. I. 246. III. 254. IV. 32.
----, compaſſing or imagining his death. IV. 76.
----, his councils. I. 227.
---------- counſel. III. 27.
---------- courts, contempts againſt. IV. 124.
---------- dignity. I. 241.
---------- duties. I. 226.
---------- enemies, adhering to. IV. 82.
---------- government, contempts againſt. IV. 123.
---------- grants. II. 346.
---------- money, counterfeiting. IV. 84.
---------- palaces, contempts againſt. IV. 124.
---------- perfection. I. 246.
---------- perpetuity. I. 249.
---------- perſon, contempts againſt. IV. 123.
---------- pleaſure, how underſtood. IV. 121.
---------- power. I. 250.
---------- prerogative. I. 237.
----------, contempts againſt. IV. 122.
----------, felonies againſt. IV. 98.
----, his prerogative in debts, judgments, and executions. III. 420.
---------- revenue, extraordinary. I. 306.
----------, ordinary. I. 281.
---------- royal family. I. 219. 225.
King, his ſeals. II. 346, 347. III. 47.
----------, counterfeiting. IV. 83. 89.
---------- ſilver. II. 350.
---------- ſovereignty. I. 241.
---------- title. I. 190.
----------, contempts againſt. IV. 123.
---------- ubiquity. I. 270.
----, injuries to or by. III. 254.
----, levying war againſt. IV. 81.
----, refuſal to adviſe or aſſiſt him. IV. 122.
King's bench, court of. III. 41. IV. 265.
----------, juſtices of, killing them. IV. 84.
Knight bachelor. I. 404.
---------- banneret. I. 403.
---------- of the bath. I. 403.
---------- garter. I. 410.
---------- ſhire, his electors. I. 172.
---------- to be returned on a lord's jury. III. 359.
Knight's-fee. I. 404. 410. II. 62.
Knighthood. I. 404. II. 69. IV. 437.
Knight-ſervice. II. 62.

L

Labour, foundation of property. II. 5.
---------- hard. IV. 370, 371, 377.
Labourers. I. 407. 426.
Laches. I. 247.
---------- of infant. I. 465.
Laeſae majeſtatis crimen. IV. 75. 89.
Laeſione fidei, ſuit *pro*. III. 52.
Laity. I. 396.
Lancaſter, county palatine of. I. 117.
----------, it's courts. III. 78.

Lancaſter, duchy of, it's courts. III. 78.
Lands. II. 16, 17,
- - - -, property in. II. 7.
Land-tax. I. 309. IV. 423.
Lapſe. II. 276. IV. 107.
Lapſed legacy. II. 513.
Larceny. IV. 229.
- - - - -, appeal of. IV. 314.
- - - - -, compound. IV. 239.
- - - - -, from the houſe. IV. 240.
- - - - - - - - - - perſon. IV. 241.
- - - - -, grand. IV. 229.
- - - - -, mixed. IV. 239.
- - - - -, only of things perſonal. IV. 232.
- - - - -, petit. IV. 229.
- - - - -, ſimple. IV. 229.
Lathes. I. 117.
Latitat, writ of. III. 286. xxiii.
Law. I. 38.
- - -, amendment of, ſtatute for. IV. 441.
- - - -, and equity, courts of, how diſtinguiſhed. III. 429.
- - - -, canon. I. 14. 19. 79. 82. 83.
- - - -, civil. I. 80.
- - - - - - - - and canon, authority of. I. 14. 79. 83. IV. 421, 422.
- - - - - - - - - - - - - -, rejected by the Engliſh nobility. I. 19.
- - - -, common. I. 63. 67.
- - - -, divine or revealed. I. 42.
- - - - - - - - - - - - - - - -, offences againſt. IV. 43.
- - -, feodal. II. 44. IV. 418.
- - - -, french. III. 317. IV. 416. 428.
- - - - greek. III. 321.
- - - - hiſtory of. IV. 407.
- - - - latin. III. 319. IV. 428.
- - - -, martial. I. 413. IV. 436.
- - - -, merchant. I. 273. IV. 67.
- - - - municipal. I. 44.
- - - - of nations. I. 43.
- - - - - - - - - - - -, offences againſt. IV. 66.
- - - - nature. I. 39.
Law of parliament. I. 163.
- - - ſide of the chancery. III. 47.
- - - - - - - - - exchequer. III. 45.
- - -, ſtatute. I. 85.
- - -, unwritten. I. 63. IV. 408.
- - - -, wager of. III. 341. IV. 414. 424.
- - -, written. I. 85.
Lawing of maſtiffs. III. 72.
Lay corporations. I. 470.
- - - inveſtiture of biſhops. I. 378.
Lazarets, eſcaping from. IV. 162.
Lead, ſtealing. IV. 233.
Leading interrogatories. III. 449.
Leap-year. II. 141.
Leaſe. II. 317. ii.
- - - - and releaſe. II. 339. ii.
- - - -, entry, and ouſter, rule to confeſs. III. 204. xi.
Leet. IV. 273. 411. 424.
Legacies. II. 512.
- - - - -, ſubtraction of. III. 98.
Legal eſtates for life. II. 124. 126. 129.
Legatine conſtitutions. I. 82.
Legiſlative power. I. 147.
Legiſlature, how far controllable. I. 161.
Legitimate child. I. 446.
Lending. II. 454.
Letter, demanding money, &c. IV. 144.
- - - -, miſſive, for electing a biſhop. I. 379.
- - - - - - - -, in chancery. III. 445.
- - - -, threatening. IV. 137. 144.
Letters patent. II. 346.
Levant and *couchant*. III. 9. 239.
Levari facias, writ of. III. 417.
Levitical degrees. I. 435.
Levying money without conſent of parliament. I. 140.
- - - - - - war againſt the king. IV. 81.
Lewdneſs. IV. 64.
Lex manifeſta. III. 344.
- - *talionis*. IV. 12.
Libel, immoral or illegal. IV. 150.

Libel, in eccleſiaſtical courts. III. 100.
- - - -, malicious. III. 125. IV. 150.
Liberam legem, loſing. III. 340. 404. IV. 348.
Liberties or franchiſes. II. 37.
Liberty, civil. I. 6. 125.
- - - - -, natural. I. 125.
- - - - - of the preſs. IV. 151.
- - - - -, perſonal. I. 134.
- - - - - - - - - - -, crimes againſt. IV. 218.
- - - -, perſonal, injuries to. III. 127.
- - - -, political. I. 125.
Licence for marriage. I. 439.
- - - - - from the pope. IV. 115.
- - - - - of alienation. II. 72.
- - - - - - mortmain. II. 269.
- - - - - to adminiſter oaths. III. 59.
- - - - - - agree in a fine. II. 350. xiv.
Licenſed curate. I. 394.
Licenſing of books. IV. 152. 439.
Licentia concordandi. II. 350. xiv.
- - - - - *loquendi*. III. 299.
Liege. I. 367.
Lieutenant, lord. I. 412. IV. 272.
Life. I. 129.
- - -, annuities. II. 461.
- - -, crimes againſt. IV. 177.
- - -. eſtates for. II. 120. v.
Ligan. I. 293. III. 106.
Ligeance. I. 366.
Light. II. 14.
- - - - houſes. I. 264.
- - - - preſumption. III. 372.
Limbs. I. 130.
Limitation of entries, actions, and indictments. III. 178. 188. 192. 196. 250. IV. 306. 308. 315. 351. 436.
- - - - - - - - - eſtate. II. 155.
- - - - - - -, ſtatutes of. III. 306.
Limited adminiſtration. II. 506.
- - - - - fee. II. 109.
- - - - - property. II. 391.
Lineal conſanguinity. II. 203.
- - - - deſcent. II. 210.
Lineal deſcent of the crown. I. 194.
- - - - warranty. II. 301.
Linen, ſtealing from place of manufacture. IV. 238.
Lip, cutting of. IV. 207.
Literary property. II. 405.
Litigious church. III. 244. 246.
Littleton. I. 72, 73.
Liturgy, reviling of. IV. 50.
Livery in chivalry. II. 69.
- - - - - - deed. II. 315.
- - - - - - law. II. 316.
- - - - of ſeiſin. II. 311. i.
Loans, compulſive. I. 140. IV. 436.
Local actions. III. 294.
Locality of trial. III. 384. IV. 303.
Locks on rivers, deſtroying. IV. 144.
Logic, it's effects upon law and theology. I. 33. II. 58. IV. 417.
Lollardy. IV. 47.
London, courts of. III. 81.
- - - - -, cuſtoms of. I. 75, 76. II. 518.
- - - - -, franchiſes of, not forfeitable. III. 264. IV. 424.
- - - - -, mayor and aldermen of, their certificate. III. 334.
Lord and vaſal. II. 53.
- - -, feodal. II. 53.
Lords committees for courts of juſtice. III. 57.
- - - -, houſe of, it's attendants. I. 168.
- - - - may kill the king's deer. I. 167.
- - - - ſpiritual. I. 155.
- - - - temporal. I. 157.
- - - - triors. IV. 259, 260. 440.
Lotteries. IV. 168.
Lunatics. I. 304. II. 291. IV. 24. 395.
- - - - - -, cognizance of. III. 427.
- - - - - -, marriage of. I. 439.
Luxury. IV. 170.

Madder

M

Madder roots, ſtealing them. IV. 233.
Madhouſes. I. 335.
Magiſtrates. I. 146.
- - - - - -, oppreſſion of. IV. 141.
- - - - - -, ſubordinate. I. 338.
- - - - - -, ſupreme. I. 338.
Magna aſſiſa eligenda, writ *de*. III. 351.
- - - - *carta*. I. 127. IV. 423. 425.
- - - - - - - -, it's contents. IV. 423, 424.
Mainour. III. 71. IV. 307.
Mainpernors. III. 128.
Mainprize, writ of. III. 128.
Maintenance of baſtards. I. 458.
- - - - - - - - - children. I. 447.
- - - - - - - - - parents. I. 454.
- - - - - - - - - ſuits. I. 428. IV. 134.
- - - - - - - - - wife. I. 242.
Making law. III. 343.
Mala in ſe. I. 54.
- - - - *prohibita*. I. 57.
Mal-adminiſtration of government. IV. 121.
Male preferred to female in deſcents. I. 194. II. 212.
- - - line preferred to female. I. 194.
- - - ſtock preferred to female. II. 234.
Malice expreſs. IV. 199.
- - - - implied. IV. 200.
- - - - prepenſe. IV. 198. 206.
Malicious miſchief. IV. 244.
- - - - - - proſecution. III. 126.
Malt-tax. I. 314.
Man, iſland of. I. 106.
Mandamus, writ of. III. 110. 264. IV. 441.
Mandates, royal, to the judges in private cauſes. I. 142. IV. 426.
Manhood. II. 54.
Manor. II. 90.
Manſion-houſe. IV. 224.
Manſlaughter. IV. 191.
- - - - - - - -, conviction of. IV. iv.
Manſtealing. IV. 219.
Manufacturers, ſeducing them abroad. IV. 160.
Manufactures, encouragement of. IV. 428.
Manumiſſion of villeins. II. 94. 347.
Marchers, lords. I. 398.
Marches. I. 398.
Mareſchall, lord. III. 38.
- - - - - -, his courts. III. 68.
Marine felonies, how clergyable. IV. 373*.
- - - - - - - - - - - triable. IV. 269.
Mariners, wandering. IV. 164.
Marines. I. 416.
Maritagium, II. 70.
Maritare. II. 71.
Maritime cauſes. III. 106.
- -,- - - - courts. III. 69.
- - - - - - ſtate. I. 419.
Mark, ſubſcribed to deeds. II. 305.
Market. I. 274. III. 218.
- - - - -, clerk of, his court. IV. 275.
- - - - - overt. II. 449.
- - - - - towns. I. 115.
Marque and repriſal. I. 258.
Marqueſſes. I. 397.
Marriage. I. 433.
- - - - - -, clandeſtine or irregular. I. 439. IV. 162.
- - - - - - contract, ſuit for. III. 93.
- - - - - -, forcible. IV. 208.
- - - - - - in chivalry. II. 70. IV. 418. 420. 421.
- - - - - - - ſocage. II. 88.
- - - - - - licences and regiſters, forging or deſtroying. IV. 163. 249.
- - - - - - of royal family. I. 225*. IV. 117.
- - - - - -, proof of. III. 140.
- - - - - -, property by. II. 433.
- - - - - - ſettlement. II. 364.
- - - - - - - - - - - - -, it's antiquity. II. 138.
- - - - - -, when good. I. 440.
Marſhall of the king's bench. III. 43.
- - - - - - - - - - - - - - - - - - -, cuſtody of. III. 43. 285.

Marſhall of the king's hoſt, certificate of. III. 334.
Marſhalſea, court of. III. 76. IV. 276.
Martial, courts. I. 416.
- - - - - law. I. 413. IV. 436.
Maſsbooks. IV. 115.
Maſter and ſervant. I. 423.
- - - - in chancery. III. 442.
- - - -, injuries to. III. 142.
- - - - of the rolls, III. 442.
- - - - - - - - - - - -, his judicial authority. III. 450.
Materia prima. III. 322.
Materna maternis. II. 236.
Matrimonial cauſes. III. 92.
Matrons; jury of. III. 362. IV. 395.
Maxims. I. 68.
Mayhem. I. 130. III. 121. IV. 205.
- - - - -, appeal of. IV. 314.
- - - - -, inſpection of. III. 332.
Mayors. IV. 413.
Meaſures. I. 274. IV. 275. 424.
- - - - - -, falſe. IV. 159.
Mediate ſtates of the empire. II. 60.
Medietate, jury *de*. III. 246. 360. IV. 128. 166. 278. 352.
Mediterranean paſſes, counterfeiting of. IV. 249.
Members of parliament. I. 153.
Memory, time of. II. 31.
Menaces. III. 120.
Menial ſervants. I. 425.
Menſa et thoro, divorce *a*. I. 440. III. 94.
Mercen-lage. I. 65. IV. 412.
Merchants, cuſtom of. I. 75.
- - - - - -, foreign. I. 260. IV. 424.
Mercheta. II. 83.
Mere right. II. 197.
- - - - - - -, not aſſignable. II. 290.
Merger. II. 178.
Meſne lords. II. 59.
- - - - proceſs. III. 279. 415.
- - - - profits, action of treſpaſs for. III. 205.
- - - - writ of. III. 234.
Metaphyſics, their effects upon law and theology. II. 58. IV. 417.
Michel-gemote. I. 147.
Michel-ſynoth. I. 147.
Middleſex, bill of. III. 285. xxiii.
Migration. II. 7.
Military cauſes. III. 103.
- - - - - courts. III. 68.
- - - - - feuds. II. 57.
- - - - - offences. I. 415. IV. 101.
- - - - - power of the crown. I. 262.
- - - - - ſtate. I. 408.
- - - - - tenures. I. 287.
- - - - - teſtament. I. 418.
Militia. I. 410. 412, 413.
Mines. I. 295.
- - - -, deſtroying their works. IV. 247.
- - - -, ſtealing ore out of. IV. 234.
Minority, none in the king. I. 248.
Minors not to ſit in parliament. I. 162.
Minſtrells. II. 96.
Miſadventure, homicide by. IV. 182.
Miſchief, malicious. IV. 244.
Miſdemeſnor. IV. 1. 5.
Miſe. III. 305. vi.
Misfortune. IV. 26.
Miſnoſmer. III. 302. IV. 334.
Miſpleading, when cured by verdict. III. 394.
Miſpriſion. IV. 119.
- - - - - - - of felony. IV. 121.
- - - - - - - - - treaſon. IV. 120.
Miſtake. IV. 27.
Miſ-uſer. II. 153.
Mitter le droit. II. 325.
- - - - *l'eſtate*. II. 324.
Mittimus. IV. 300.
Mixed actions. III. 118.
- - - - larciny. IV. 239.
- - - - tithes. II. 24.
Modus decimandi. II. 29.
Moërda. IV. 194.
Mollitur manus impoſuit. III. 121.
Monarchy, I. 49.
Money. I. 276.
- - - - - bills. I. 170. 184.
- - - - - counterfeiting. IV. 84. 88.

Money expended for another, action for. III. 163.
- - - - received to another's use, action for. III. 163.
Monk. I. 132.
Monopolies. IV. 160. 436.
- - - - - - - -, stay of suits therein. IV. 116.
Monsters. II. 246.
Monstrans de droit. III. 256.
Month. II. 141.
Monuments. II. 428.
Mort d'ancestor, assise of. III. 185.
Mortgage. II. 157. IV. 435.
- - - - - - -, how considered in equity. III. 435.
Mortmain. I. 479. II. 268. IV. 108. 424. 426. 441.
Mortuaries. II. 425.
Mortuo vadio, estate *in*. II. 57.
Mother-church. I. 113.
Motion in court. III. 304.
Moveables. II. 384.
- - - - - - -, property in. II. 5.
Mount, or bank. I. 328.
Mountebanks, IV. 167.
Mulier puisné. II. 248.
Multiplicity of laws, it's original. III. 325.
Municipal law. I. 44.
Murder. IV. 194.
- - - - - by perjury. IV. 138. 196.
- - - - -, conviction of. IV. i.
- - - - -, indictment of. IV. ii.
- - - - -, when pardonable. IV. 194. 400.
Murdrum. III. 321. IV. 195.
Muta canum. II. 427.
Mute, standing. IV. 324.
- - - - - - - - -, advising it. IV. 126.
Mutilation. I. 130. III. 121. IV. 207.
- - - - - - -, punishment by. IV. 377.
Mutiny-act. I. 415.
Mutual debts. III. 305.

N

Namium vetitum, vel repetitum. III. 149.
National debt. I. 328. IV. 440.
Nations, law of. I. 43. IV. 66.
Nativi. II. 94.
Natural liberty. I. 125.
- - - - - life. I. 132. II. 121.
- - - - - persons. I. 123.
Natural-born subjects. I. 366. 371.
Naturalization. I. 374. II. 250.
Nature, crime against. IV. 215.
- - - - -, guardian by. I. 461.
- - - - -, law of. I. 39.
Navigation-acts. I. 419. IV. 439.
Navigations, destroying. IV. 244.
- - - - - - - -, hard labour for the benefit of. IV. 371.
Navy, articles of. I. 420*.
Ne admittas, writ of. III. 248.
- - *exeat regnum*. I. 137. 266. IV. 122.
- - *injuste vexes*, writ of. III. 234.
Necessity. IV. 27.
- - - - - -, homicide by. IV. 178.
Negative in corporations. I. 478.
- - - - - - of the king. I. 154.
Neglect of duty, action for. III. 163.
Negligence of officers. IV. 140.
Negligent escape. III. 415. IV. 130.
Negro. I. 127. 425. II. 402.
Neise. II. 94.
Nembda. III. 350.
New assignment. III. 311.
- - - trial. III. 387. IV. 361. 438.
News, false. IV. 149.
Next of kin. II. 224.
Nient culpable, plea of. IV. 339.
Night, in burglary, what. IV. 224.
Nightwalkers. IV. 292.
Nihil dicit, judgment by. III. 296. 397.
- - -, return of, to writs. III. 282. xvii.
Nihil habet, plea of. III. 305.
Nisi prius, courts of. III. 58.
- - - - -, justices of. III. 60. IV. 269.
- - - - - -, trial at. III. 353. IV. 351.
- - - - - -, writ of. III. 354. xiii.
Nobility. I. 396.
- - - - - -, it's uses. I. 157.
Nocturnal crimes, how prevented or resisted. IV. 180.

Non assumpsit. III. 305.
- - - - - - - - *infra sex annos.* III. 308.
- - - *compos mentis.* I. 304. II. 497. IV. 24. 395.
- - - *cul.* IV. 339.
- - - *culpabilis*, plea of. III. 305. IV. 339.
- - - *decimando*, prescription *de.* II. 31.
- - - *est factum*, plea of. III. 305.
- - - *est inventus*, return of. III. 283. xviii, xix. xxiii.
- - - *obstante.* I. 342. II. 273. IV. 401.
- - - *prosequitur.* III. 296.
- - - *sum informatus*, judgment by. III. 397.
Non-claim in fines. II. 354.
- - - - - - - of infants. I. 465.
Nonconformity. IV. 51. 432.
Nonjuror. IV. 124.
Non-payment of ecclesiastical dues. III. 89.
Non-residence. II. 322.
Nonsuit. III. 296. 316. 376. vi.
- - - - -, judgment as in case of. III. 357.
Non user. II. 153.
Northern borders, rapine on. IV. 244.
Northumberland, theft in. IV. 238.
Norman conquest. I. 99. IV. 414. 415.
- - - - isles. I. 107.
Nose, cutting off or slitting. IV. 207. 247. 377.
Not guilty, plea of. III. 305. xiii. IV. 338. iii.
Note of a fine. II. 351. xv.
- - - - - hand. II. 467.
Notice in ejectment. III. 203. x.
- - - - - of trial. III. 357.
Novel disseisin, assise of. III. 187.
Novels, in the civil law. I. 81.
Nudum pactum. II. 445.
Nul disseisin, plea of. III. 305. II. xvi. i.
- - *tiel record.* III. 331.
- - *tort*, plea of. III. 305.
Nuncupative wills. II. 500.
Nurture, guardian for. I. 461.
Nusance. abatement of. III. 5.
- - - - - -, assise of. III. 220.
- - - - - -, common. IV. 166.
- - - - - -, private. III. 216.

O

Oath *ex officio.* III. 101. 447.
- - - - of the party. III. 382. 437.
Oaths to the government, refusal or neglect to take them. I. 368. IV. 116, 117. 123.
- - -, voluntary and extrajudicial. IV. 137.
Obedience to parents. I. 452.
Objects of the laws of England. I. 121.
Obligation of human laws. I. 57.
- - - - - - -, or bond. II. 340. xiii. III. xxiv.
Obstructing of process. IV. 129.
Occupancy. II. 3. 8. 258. 400.
Odhal right. II. 45.
Odio et atia, writ *de.* III. 128.
Oeconomy, public, offences against. IV. 162.
Office found. III. 259.
- - - - inquest of. III. 258.
Officers, arrest by. IV. 292.
- - - - -, killing them in executing their office. IV. 200.
- - - - - of courts, their certificates. III. 336.
- - - - -, refusal to admit. III. 264.
- - - - -, removal of. III. 264.
Offices. I. 272. II. 36.
- - - - and pensions, duty on. I. 327.
Officio, oath *ex.* III. 101. 447.
Oleron, laws of. I. 419. IV. 423.
Opening council. III. 366.
Oppression of crown, how remedied. I. 243.
- - - - - - - - - magistrates. IV. 141.
Option of the archbishop. I. 381.
Optional writs. III. 274.

Orchards, robbing of. IV. 233.
Ordeal, trial by. IV. 342. 414. 425.
Order of seſſions. IV. 272.
Orders, holy. I. 388.
Original contract of king and people. I. 211. 233.
- - - - - - - - - - ſociety. I. 47.
- - - - - conveyances. II. 310.
- - - - - of a deed. II. 296.
- - - - - proceſs. III. 279.
- - - - - writ. III. 272. ix. xvi.
Orphanage. II. 519.
Oſtium eccleſiae, dower *ad*. II. 132.
Overſeers of the poor. I. 359.
Overt act of treaſon. IV. 79. 86. 357.
- - -, market. II. 449.
- - -, pound. III. 12.
Ouſter of chattels real. III. 198.
- - - - - freehold. III. 167.
Ouſterlemain. II. 68.
Outlawry. I. 142. III. 284. xix. IV. 319.
Owling. IV. 154.
Oyer. III. 299. xxviii.
- - - and *terminer*, commiſſion of. IV. 269. i.
- - - - - - - - - -, juſtices of, killing them. IV. 84.
Oyez. IV. 340.

P

Pains and penalties, act to inflict. IV. 259.
Pais, matter *in*. II. 294.
- - -, trial *per*. III. 349. IV. 349.
Palace court. III. 76.
Palatine counties. I. 117. IV. 431.
- - - - - - - - - -, their courts. III. 79.
Pandects. I. 81.
- - - - - diſcovered. I. 17. 81.
Panel of jurors. III. 354. IV. 302. 350.
Papal encroachments. IV. 104.
- - - proceſs, obedience to. IV. 115.
Paper book. III. 317. 407.
- - - credit. I. 330. II. 466. IV. 441.
Papirian code. I. 81.
Papiſts, children of. I. 449. 451.
- - - -, incapacities of. II. 257. 293.
- - - -, laws againſt. IV. 55. 87. 425.
Paramount, lord. II. 59. 91.
Paraphernalia. II. 435.
Paravail, tenant. II. 60.
Parcels in a conveyance. II. i, ii. iv.
Parceners. II. 187.
Parco fracto, writ *de*. III. 146.
Pardon. IV. 316. 337. 376. 396.
- - - - for diſcovering accomplices or receivers. IV. 331.
- - - - not pleadable to impeachment. I. 334. IV. 261. 399. 440.
Pardoning, prerogative of. I. 269. IV. 397.
Parent and child. I. 446.
- - - -, injuries to. III. 140.
Parental power. I. 452.
Parents, *&c.* their conſent to marriage. I. 437.
Pares curtis. II. 54.
- - -, trial *per*. III. 350.
Pariſh. I. 112.
Pariſh-clerk. I. 395.
Park. II. 38. 416.
Parliament. I. 141. 147. IV. 412. 425. 428.
- - - - - -, court of the king in. IV. 259. 263.
- - - - - -, diſuſe of. IV. 437.
- - - - - - of France. I. 147.
- - - - - -, power of. I. 160.
- - - - - - rolls. I. 181.
- - - - - -, ſummons of. I. 150.
Parliamentum indoctum. I. 177.
Parol conveyances. II. 297.
- - -, demur of. III. 300.
- - - evidence. III. 369.
- - - or pleadings. III. 293.
Parricide. IV. 202.
Parſon. I. 384.
- - - - imparſonee. I. 391.

Particular eſtate. II. 165.
- - - - - - tenants, alienation by. II. 274.
Parties to a deed. II. 298. ii, iii.
- - - - - - - fine. II. 355.
Partition. II. 189.
- - - - - -, deed of. II. 323.
- - - - - -, writ of. II. 189. III. 302.
Partnerſhip, cognizable in equity. III. 437.
Paſs-ports. I. 260.
- - - - - -, violation of. IV. 68.
Paſture, common of. II. 33.
Patents. II. 346.
- - - - - for new inventions. IV. 159*.
- - - - - of peerage. I. 400.
- - - - - - - precedence. III. 28.
Patent-rolls. II. 346.
- - - - writs. II. 346.
Paterna paternis. II. 236.
Patriam, trial *per*. III. 349. IV. 349.
Patronage. II. 21.
- - - - - -, diſturbance of. III. 242.
Pauper-cauſes. III. 400.
Pawns. II. 452.
Payment of deceaſed's debts. II. 511.
- - - - - - - money into court. III. 304.
Peace and war, right of making. I. 257.
- - - -, breach of. IV. 142.
- - - -, clerk of. IV. 272.
- - - -, commiſſion of. I. 351. IV. 270.
- - - -, converſation of. I. 349.
- - - -, juſtices of. I. 349. IV. 270. 282. 290. 292. 428.
- - - - - - - - - - -, conviction by. IV. 281.
- - - -, offences againſt. IV. 142.
- - - -, ſecurity for. IV. 251. 254.
- - - -, the king's. I. 118. 268. 350.
Peculatus. IV. 122.
Peculiars, court of. III. 65.
Pecuniary cauſes in eccleſiaſtical courts. III. 88.
- - - - - - legacies. II. 512.
Peerage, benefit of, in offences. IV. 367.
Peereſſes. I. 401.
Peers, great council of. I. 227, 228.
- - - -, hereditary counſellors of the crown. I. 227.
- - - -, houſe of. I. 155. III. 57.
- - - -, pedigrees of. III. 106.
- - - -, privileges of. I. 401. III. 359. IV. 253. 273. 367.
- - - -, proteſts of. I. 168.
- - - -, proxies of. I. 168.
- - - -, trial by. I. 401. IV. 260 348.
Peine forte et dure. IV. 325.
Penal ſtatutes. I. 88. IV. 429.
Penalty of a bond. III. 435.
Penance, commutation of. IV. 105. 217. 276.
- - - - - for ſtanding mute. IV. 325.
- - - - - in eccleſiaſtical courts. IV. 105. 275. 368.
Pendente lite, adminiſtration. II. 503.
Penitentiary houſes. IV. 371.
Penſion, eccleſiaſtical. I. 281. II. 40.
- - - - - from the crown. I. 176.
- - - - - - - - - - - - - - -, duty on. I. 327.
- - - - from foreign princes. IV. 122.
Penſioners excluded from the houſe of commons. I. 175.
People. I. 366.
Per et cui, writ of entry in. III. 181.
- - - *my et per tout*, ſeiſin. II. 182.
- - - *quod*. III. 124.
- - -, writ of entry in. III. 181.
Peremptory challenge. IV. 353. 396.
- - - - - - - *mandamus*. III. 111. 265.
- - - - - - - writ. III. 274.
Perfection of the king. I. 246.
Perjury. IV. 137.
- - - - - in capital caſes. IV. 138. 196.
Permiſſive waſte. II. 281.
Pernancy of profits. II. 163.
Perpetual curate. I. 394.
Perpetuating the teſtimony of witneſſes. III. 450.
Perpetuity of the king. I. 249.

Perſecution, religious. IV. 46. 428. 432.
Perſon, injuries to. III. 119.
- - - - -, larciny from. IV. 241.
- - - - -, offences againſt. IV. 177.
Perſonal actions. III. 117.
- - - - - - - - - -, where they die with the perſon. III. 302.
- - - - -, aſſets. II. 510.
- - - - - chattels. II. 387.
- - - - - ſecurity. I. 129.
- - - - - things. II. 384.
- - - - - tithes. II. 24.
Perſonating others in courts, &c. IV. 128.
- - - - - - - proprietors of ſtock. IV. 248.
Perſons artificial. I. 123. 467.
- - - - natural. I. 123.
- - - -, rights of. I. 122.
Peter-pence. IV. 107.
Petition of appeal. III. 454.
- - - - - - - bankruptcy. II. 480.
- - - - - - - right. I. 128. III. 256. IV. 437.
Petitioning, right of. I. 143. IV. 147.
- - - - - - -, tumultuous. I. 143. IV. 147.
Petty bag office. III. 49.
- - - - conſtables. I. 355.
- - - - jury. III. 351.
- - - - larciny. IV. 229.
- - - - ſerjeanty. II. 81.
- - - - ſeſſion. IV. 272.
- - - - treaſon. IV. 75. 203.
Pews, II. 429.
Phyſicians, &c. III. 122. IV. 197.
Piepoudre, court of. III. 32.
Pignus. II. 159.
Pillory. IV. 377.
Piracy. IV. 71.
Piſcary, common of. II. 34. 40.
Placemen excluded from the houſe of commons. I. 175. IV. 440.
Plagiarii. IV. 219.
Plague, irregularity during. IV. 161.
Plaint. III. 273.
Plaintiff. III. 25.
Plantations. I. 107.
- - - - - - -, deſtroying of. IV. 246.
Plants, deſtroying of. IV. 247.
- - - -, ſtealing of. IV. 233.
Plea, at law. II. xviii. III. 301. xii. xxix.
- - - in bar of execution. IV. 396. v.
- - - - equity. III. 446.
- - - to indictment. IV. 332. iii.
Pleadings. III. 293. IV. 427.
Pleas of the crown. III. 40. IV. 2. 424.
Pleaſure of the king, how underſtood. IV. 121.
Plebiſcita. I. 80.
Pledge. II. 452.
- - - -, eſtates in. II. 157.
Pledges of appearance. III. 280. x. xvii.
- - - - - - - battel. III. v.
- - - - - - - proſecution. II. xiv. xvii. III. 275. i. iii. ix, x. xvii.
Plegii de proſequendo in replevin. III. 147.
- - - - *retorno habendo*. III. 147.
Plena probatio. III. 371.
Plenarty. III. 243.
Plenum dominium. II. 312.
Plough-bote. II. 35.
Pluries habeas corpus. III. 135.
- - - -, writ. III. 283. xix. IV. 319.
Pocket-ſheriffs. I. 342.
Poiſoning. IV. 196.
Police, offences againſt. IV. 162.
Policies of inſurance. II. 458. IV. 441.
- - - - - - - - - - - - -, court of. III. 74.
Political liberty. I. 125.
Poll, deed. II. 296.
Polls, challenge to. III. 361. IV. 352.
Polygamy. I. 436. IV. 163.
Pone, writ of. III. 34. 37. 195. 280. ii. xvii.
Poor. I. 359.
Poor-laws. I. 131. 359. IV. 432.

Poor-settlements. I. 362.
Pope, his authority, how demolished, IV. 104. 421. 428. 430.
- - - - - - encroachments. IV. 104. 419. 424, 425.
- - - - - - - jurisdiction, defending it. IV. 87. 115.
- - - - - - - reconciliation to. IV. 87.
Popery. IV. 55.
Popish books, importing or selling. IV. 115.
- - - - - priest. IV. 57. 87. 115.
- - - - - recusants. IV. 56. 124.
- - - - - seminaries, education in. I. 451. IV. 55. 115.
- - - - - - - - - - -, maintaining. IV. 115.
Popular actions. II. 437. III. 161.
Portions, methods of raising. II. vii.
Port-reeve. IV. 413.
Ports and havens. I. 264.
Positive proof. III. 371.
Posse comitatus. I. 343.
- - - - - - - - -, neglecting to join. IV. 122.
Possessio fratris. II. 228.
Possession, actual right of. III. 180.
- - - - - -, apparent right of. III. 177. 179.
- - - - - -, estates in. II. 163.
- - - - - -, naked. II. 195. III. 177.
- - - - - -, property in. II. 389.
- - - - - -, right of. II. 196.
- - - - - -, writ of. III. 202. 412. xv.
Possessory action. II. 198. III. 180.
Possibilities not assignable. II. 290.
Post, writ of entry in. III. 182.
Post-disseisin, writ of. III. 188.
Postea. III. 386. xiii.
Post-fine. II. 350.
Posthumous children. I. 130. II. 169.
Post-letters, stealing. IV. 239.
Post-man in the exchequer. III. 28.
Post-office. I. 322.
- - - - - -, misbehaviour of it's officers. IV. 234.
Pound. III. 12.
Poundage. I. 316. IV. 437.
Pound-breach. III. 146.
Pow-dike, cutting. IV. 244.
Power of the crown. I. 250.
- - - - - - parent. I. 452.
Poyning's law. I. 102, 103.
Praecipe, writ of. III. 274.
- - - - - - *in capitæ*, writ of. III. 195.
- - - - - - - - common recoveries. II. 358. xvii.
- - - - - - - - fines. II. 350. xiv.
- - - - - - tenant to. III. 182.
Praemunire. IV. 103. 428.
Praetor's edicts. I. 80.
Pre-audience. III. 28.
Prebendary. I. 383.
Precedence. II. 224. 272. III. 105.
- - - - - - - - of royal family. I. 225*.
- - - - - - - -, patent of. III. 28.
- - - - - - - -, table of. I. 405.
Precedent conditions. II. 154.
Precept of election to parliament. I. 177.
Pre-contract. I. 434.
Predial tithes. II. 24.
Pre-emption. I. 287. IV. 116. 424. 439.
Pregnancy, plea of. IV. 394.
- - - - - - -, trial of. I. 456. IV. 395.
Premier serjeant. III. 28.
Premises of a deed. II. 298. i, ii, iii.
Prerogative. I. 141. 237. 252. IV. 431, 432.
- - - - - - - -, causes of it's increase and decline. IV. 433.
- - - - - - - -, comparative review of. I. 336. IV. 440.
- - - - - - - -, contempts against. IV. 122.
- - - - - - - -, copyrights. II. 410.
- - - - - - - -, court. II. 509. III. 65.
- - - - - - - -, felonies against. IV. 98.
- - - - - - -, property by. II. 408.
Prescription. II. 263.
- - - - - - - -, corporations by. I. 473.
- - - - - - - -, time of. II. 31.
Presentation to benefices. I. 389. II. 23.

Preſentative advowſons. II. 22.
Preſentment of copyhold ſurrenders. II. 369.
- - - - - - - - - offences. IV. 301.
Preſident of the council. I. 230.
Preſs, liberty of. IV. 151.
Preſſing of ſeamen. I. 418.
- - - - - - to death. IV. 328.
Preſumptions. III. 371.
Preſumptive evidence of felony. IV. 358.
- - - - - - - - heir. II. 208.
Pretended titles, ſelling or buying. IV. 136.
Pretender and his ſons, treaſons relating to. IV. 91.
Prevention of crimes. IV. 251.
- - - - - - - - - - - - - -, homicide for. IV. 180.
Price. II. 446. 454.
Prieſt. I. 388.
Primae preces. I. 381.
Primary conveyances. II. 309.
Primer fine. II. 350.
- - - - *ſeiſin* II. 66. 87. IV. 418.
Primogeniture. I. 194. II. 214. IV. 421.
Prince of Wales. I. 225.
Princes of the blood royal. I. 226.
Princeſs of Wales, violating her. I. 225. IV. 81.
- - - - - royal. I. 225.
- - - - - - - - - - violating her. I. 225. IV. 81.
Principal and acceſſory. IV. 34.
- - - - - - challenge. III. 363.
Prior. I. 155.
Priority of debts. II. 511.
Priſage. I. 315.
Priſon, breach of. IV. 130.
Prît. IV. 339.
Private act of parliament. I. 86. II. 344.
- - - - - nuſance. III. 216.
- - - - - perſons, arreſt by. IV. 292.
- - - - - wrongs. III. 2.
Privately ſtealing from the perſon. IV. 242.
Privies to a fine. II. 355.
Privilege. I. 272.
- - - - -, bill of. III. 289.
- - - - - from arreſts. III. 289.
- - - - - of parliament. I. 164.
- - - - -, writ of. I. 166.
Privileged places. IV. 129.
- - - - - - villenage. II. 98.
Privilegia, I. 46.
Privilegium clericale. IV. 365.
- - - - - -, property *propter.* II. 394.
Privy council. I. 229.
- - - - counſellor, killing or attempt to kill. I. 232. IV. 100.
- - - - purſe. I. 334.
- - - - ſeal. II. 347.
- - - - ſignet. II. 347.
- - - - - - - -, forging them. IV. 89.
- - - - tithes. I. 388.
- - - - verdict. III. 377. IV. 360.
Prize cauſes. III. 108.
- - - - - - - -, commiſſion of. III. 69.
Probable preſumption. III. 372.
Probate of will. II. 508.
Procedendo, writ of. I. 353. III. 109.
Proceſs civil. III. 279. xvi.
- - - - -, criminal. IV. 318.
- - - - -, obſtructing it's execution. IV. 129.
Prochein amy. I. 464.
Proclamations by the king. I. 270. IV. 431.
- - - - - - - - - of a fine. II. 352. xvi.
- - - - - - - - - - eſtrays. I. 298.
- - - - - - - - - on attachment in chancery. III. 444.
- - - - - - - - - - exigent. III. 284. xix. IV. 319.
- - - - - - - - - - the riot-act. IV. 143.
- - - - - - - - -, writ of. III. 284. xxi.
Proctor. III. 25.
Procuration-money. IV. 157.
Prodigals. I. 305.
Profaneneſs. IV. 59.
Profert in curia. III. xxviii.
Profeſſion, religious. I. 133.
Profeſſor of the laws, his duty. I. 35.
Profits of courts. I. 289.

Progreſs, royal. IV. 411.
Prohibition, declaration in. III. 113.
- - - - - -, writ of. III. 112.
Promiſes. III. 158.
Promiſſory note. II. 467.
Promulgation of laws. I. 45.
Proofs. III. 368.
- - - - - in eccleſiaſtical courts. III. 100.
Proper feuds. II. 58.
Property. I. 138. II. 1, 2.
- - - - -, crimes againſt. IV. 230.
- - - - -, injuries to perſonal. III. 144.
- - - - - - - - - - - - to real. III. 167.
- - - - - -, right of. II. 197. III. 190.
Prophecies, pretended. IV. 149.
Proprietary governments in America. I. 109.
Proprietate probanda, writ *de*. III. 148.
Prorogation of parliament. I. 187.
Proſecution by the king. I. 268.
- - - - - - -, expenſes of. IV. 362.
- - - - - - -, malicious. III. 126.
- - - - - - - of offenders. IV. 301.
Protection of children. I. 450.
- - - - - - - - embaſſadors. I. 254.
- - - - - - -, writ of. III. 289.
Protector. I. 248.
Proteſt of bills and notes. II. 468, 469.
- - - - - - - lords in parliament. I. 168.
Proteſtant diſſenters. IV. 53.
- - - - - - ſucceſſion. I. 216, 217.
- - - - - - - - - - - - - -, treaſon againſt. IV. 90.
Proteſtation. III. 311. xxx.
Province. I. 111.
Provincial conſtitutions. I. 82.
- - - - - - - governments in America. I. 109.
Proving will in chancery. III. 450.
Proviſions, papal. I. 60. IV. 107.
- - - - - - -, ſelling unwholeſome. IV. 162.
Proviſo, trial by. III. 357.
Proviſors, ſtatutes againſt. IV. 110. *&c.*
Proxies in the houſe of lords. I. 168.
Puberty, age of. IV. 22.
Public act of parliament. I. 85.
- - - - verdict. III. 377. IV. 360.
- - - - wrongs. IV. 1.
Publication of depoſitions. III. 450.
Pueritia. IV. 22.
Puis darrein continuance, plea. III. 316.
Puiſné barons of the exchequer. III. 44.
- - - - juſtices. III. 40, 41.
Pulling down churches, houſes, *&c.* IV. 143.
Pulſation. III. 120.
Puniſhment. IV. 7.
- - - - - - -, capital. IV. 9. 18. 236*. 441.
- - - - - - -, certainty of. IV. 377.
- - - - - - -, end of. IV. 11. 252.
- - - - - - -, infliction of. IV. 258.
- - - - - - -, meaſure of. IV. 12.
- - - - - - -, power of. IV. 7.
- - - - - - -, ſeverity of. IV. 16.
Per auter vie, tenant to. II. 120.
Purchaſe. I. 215. II. 241.
- - - - - - of writs. III. 273. 274.
Purchaſor, firſt. II. 220.
Pure villenage. II. 290.
Purgatio vulgaris. IV. 342.
Purgation, canonical. III. 342. IV. 368.
- - - - - - -, oath of. III. 100. 447.
Purpreſture. IV. 167.
Purſuit of remedies. III. 270.
Purveyance. I. 287. IV. 116. 424. 439.
Putting in fear. IV. 242.

Q

Quadruplicatio. III. 310.
Qualification for killing game. II. 417. IV. 175.
- - - - - - - - - of electors to parliament. I. 171.
- - - - - - - - - jurors. III. 362.

Qualification of juſtices of the peace. I. 352.
- - - - - - - - - - members of parliament. I. 175.
Qualified fees. II. 109.
- - - - - - property. II. 391.
Quantum meruit. III. 163.
- - - - - *valebat*. III. 163.
Quare clauſum fregit. III. 281.
- - - - *ejecit infra terminum*, writ of. III. 207.
- - - - *impedit*. III. 246.
- - - - *incumbravit*. III. 248.
- - - - *non admiſit*, writ of. III. 250.
Quarentine. II. 135.
- - - - - - - -, irregularity in. IV. 161.
Quarrelling in church or churchyard. IV. 146.
Quartering of ſoldiers. I. 414, 415.
- - - - - - - - - traitors. IV. 92. 376.
Quarter-ſeſſions, court of. IV. 271.
Quarto die poſt. III. 278.
Quaſhing. III. 303. IV. 321.
Quays. I. 264.
Que eſtate. II. 264.
Queen. I. 219.
- - - - Anne's bounty. I. 286.
- - - - compaſſing or imagining her death. I. 223. IV. 76.
- - - - conſort. I. 219.
- - - - dowager. I. 224.
- - - - gold. I. 221.
- - - -, her attorney and ſolicitor. I. 220. III. 28.
- - - - - - - revenue. I. 221, 222.
- - - - regnant. I. 219.
- - - - - - - - - -, her huſband. I. 224.
- - - -, violating her. I. 224. IV. 81.
Queſtion, or torture. IV. 325.
Qui tam actions. III. 162. IV. 307.
Quia dominus remiſit curiam, writ of right. III. 195.
Quia emptores, ſtatute of. II. 91. IV. 426.
Quick with child. IV. 395.
Quiet enjoyment, covenant for. II. x.
Quinto exactus, III. 283. xx. IV. 319.
Quit-claim. II. xv.
Quit-rents. II. 42.
Quo minus, writ of. III. 46. 286. xxiv.
Quo warranto, information in nature of. I. 485. III. 263. IV. 311. 441.
- - - - - - - - -, writ of. III. 262.
Quod ei deforciat, writ of. III. 193.
- - - -, *permittat*, writ of. III. 240.
- - - - - - - - -, *proſternere*, writ of. III. 221.
Quorum clauſe, in commiſſions. I. 351.

R

Rack. IV. 325.
Rack-rent. II. 43.
Rank, *modus*. II. 30.
Ranſom. IV. 380.
Rape, appeal of. IV. 314.
- - - - in counties. I. 117.
- - - - of women. IV. 210.
Rapina. IV. 243.
Raſure in a deed. II. 308.
Rationabili parte bonorum, writ *de*. II. 492.
- - - - - - - - - - writ of right *de*. III. 194.
Rationabilis dos. II. 134.
Raviſhment of children. III. 141.
- - - - - - - - - ward. III. 141.
- - - - - - - - - wife. III. 139.
Reading of deeds. II. 304.
- - - - - -, on claim of clergy. IV. 367. 441.
Real actions. III. 117.
- - -, aſſets. II. 244. 302.
- - -, chattels. II. 386.
- - -, compoſition for tithes. II. 28.
- - -, things. II. 16.
Reaſon of the law. I. 70.
Reaſonable part. II. 492. 516. IV. 408. 424.
Re-aſſurance. II. 460.
Rebellion, commiſſion of. III. 444.
Rebutter. III. 310.
Recal of ſubjects from abroad. I. 266. IV. 122. 160*.
Recaption. III. 4. IV. 363.
- - - - - -, writ of. III. 151.
Receiving ſtolen goods. IV. 132.

Recitals in a deed. II. 298. iv.
Reclaimed animals. II. 391.
Recognizance. II. 341.
- - - - - - - - for the peace or good behaviour. IV. 252.
- - - - - - - - in nature of ſtatute ſtaple. II. 160. 342. IV. 431.
- - - - - - - - of bail. II. 391. xv.
- - - - - - - - - - fine. II. xv, xvi.
Recompence in value. II. 359.
Reconciliation to the pope, &c. IV. 87.
Record. I. 69. III. 24. IV. 426.
- - - -, aſſurance by. II. 344.
- - - -, court of. III. 24.
- - - -, debt of. II. 465.
- - - -, imbezzling of. IV. 128.
- - - -, of actions. II. xviii. III. 317. iv. xii. xxvi.
- - - - - forcible entry or detainer. IV. 148.
- - - - - riot. IV. 147.
- - - -, trial by. III. 330.
- - - -, vacating of. IV. 128.
Recordari facias loquelam. III. 34. 37. 195.
Recovery, common. II. 116. 271. 357. xvii. IV. 429.
- - - - - - in value. II. 359. xix.
- - - - - -, reviſal of, when ſuffered of copyhold. II. 368. III. 166*.
- - - - - -, roll. II. 358. xvii.
Recreant. III. 340. IV. 348.
Rector of a church. I. 384.
Rectorial tithes. I. 388.
Recuſants, popiſh. IV. 55. 124.
Recuſatio judicis. III. 361.
Reddendum of a deed. II. 299. i. iii.
Re-diſſeiſin, writ of III. 188.
Redreſs of injuries. III. 2.
Reference to maſters in chancery. III. 453.
Reformation of religion. IV. 430.
Refuſal of a clerk. I. 389.
Regalia majora et minora. I. 241.
Regard, court of. III. 72.
Regardant, villeins. II. 93.
Regent. I. 240.
- - - -, queen. I. 219.
Regiſter of deeds. II. 343.
- - - - - marriages. IV. 163.
Regiſter of ſeamen. I. 419*.
Regiſtrum omnium brevium. III. 183.
Regnant, queen. I. 219.
Regrating. IV. 160.
Rejoinder. III. 310.
- - - - - in error. III. xxxiii.
Rehearing. III. 453.
Relation back in bankruptcy. II. 486.
- - - - - - - - forfeiture. IV. 381. 386, 387.
- - - - - - - - judgments. III. 420, 421.
Relations, private. I. 422.
- - - - - public. I. 146.
Relative rights and duties. I. 123. 146.
Relator, in informations. III. 264. 427. IV. 308.
Releaſe of lands. II. 324. iii.
Relief. II. 56. 65. 87. IV. 418. 420, 421.
Religion, offences againſt. IV. 443.
Religious impoſtures. IV. 61.
Rem, information *in*. III 262.
Remainder in chattels perſonal. II. 398.
- - - - - - of lands. II. 164.
- - - - - -, writ of formedon in. III. 192.
Remedial part of laws. I. 55.
- - - - - ſtatute. I. 86.
Remiſe. II. xv.
Remitter. III 19. 190.
Removal of poor. I. 364.
Rent. II. 41, 42. 57. 299.
- - - charge. II. 42.
- - -, remedy for. III. 6. 206. 231. IV. 441.
- - - ſeck. II. 42.
- - - ſervice. II. 41.
- - -, ſubtraction of. III. 230.
Repetitum namiam. III. 149.
Repleader. III. 395.
Replevin. III. 13. 170.
- - - - -, action of. III. 146.
- - - - -, bond. III. 148.
Replicatio. III. 310.
Replication at law. III. 309. iv. xxix.
- - - - - - in criminal caſes. IV. 339. v.
- - - - - - - - equity. III. 448.

Reports

Reports by the master in chancery. III. 453.
- - - - - of adjudged cases. I. 71.
Representation in descents. II. 217.
- - - - - - - - - - - - - - - - - - of the crown. I. 194. 201.
- - - - - - - - - - - - - distribution. II. 517.
- - - - - - - - - - - - - parliament. I. 159.
Reprieve. IV. 394.
Reprisal of goods. III. 4.
Reprisals on foreigners. I. 258.
Republication of will. II. 379. 502.
Repugnant conditions. II. 156.
Reputation. I. 134.
- - - - - - -, injuries to. III. 123.
Requests, court of. I. 230. III. 51.
- - - - - - - - - - - - - - -, for small debts. III. 81.
Rere-fiefs. II. 57.
Rescripts of the emperor. I. 58.
Rescous, writ of. III. 146.
Rescue. III. 12. 170. IV. 125. 131.
Residence. I. 390. 392.
Residuum of intestates' effects. II. 514.
Resignation. I. 382. 393.
Resistance. I. 251. IV. 436. 440.
Respite of jury. III. 354. xiii.
Respondeat ouster. III. 303. 396. IV. 338.
Respondentia. II. 458.
Responsa prudentum. I. 80.
Restitution in blood, *&c.* IV. 402.
- - - - - - - - of conjugal rights. III. 94.
- - - - - - - - - - stolen goods. IV. 362.
- - - - - - - - - - temporalties. I. 380. IV. 421.
- - - - - - - - - - writ of. IV. 188. 363.
Restoration, *A. D.* 1660. I. 210. IV. 438.
Restraining statute. I. 87.
- - - - - - - - - - - - of leases. II. 320. IV. 432.
Resulting use. II. 335.
Retainer of debts. II. 511. III. 18.
- - - - - - - servants by another. III. 142.
Retaliation. IV. 12.
Retorno habendo, plegii de. III. 148.
Retorno habendo, writ *de*. III. 150. 413.
Retraxit. III. 296. 395.
Return, false or double. I. 180.
- - - - - - - - -, action for. III. 111. 372.
- - - - - - -, irrepleviable, writ of. III. 150.
- - - - - - - of writs. III. 273.
- - - - - - - - - - - - form of. II. xiv. xvii. xix. III. iii. vii. xv, xvi, xvii, xviii, xix, xx, xxi, xxii, xxiii, xxiv. xxxii. xxxiv, xxxv.
Return day of writs. III. 275.
Returns of the term. III. 277.
Revealed law. I. 42.
Revenue causes, cognizance of. III. 428.
- - - - - - - - - - -, trial of. IV. 281.
- - - - -, extraordinary. I. 307.
- - - - -, ordinary. I. 281.
Reversal of attainder. IV. 392.
- - - - - - - judgment. III. 411. xxxiii. IV. 390.
- - - - - - - outlawry. III. 284. IV. 320. 392.
Reversion. II. 175.
- - - - - - -, it's incidents, II. 176.
- - - - - - - - - - assignee, intitled to what remedies. III. 158.
Revertendi animus. II. 392.
Revertur, writ of formed on in. III. 192.
Review, bill of. III. 454.
- - - - -, commission of. III. 67.
Reviling church ordinances. IV. 50.
Revival of persons hanged. IV. 406.
Revivor, bill of. III. 448.
Revocation of devises. II. 376.
- - - - - - - - - - uses. II. 335. 339. xi.
- - - - - - - - - - will. II. 502.
Revolution, *A. D.* 1688. I. 211. IV. 440.
Rewards for apprehending offenders. IV. 294, 295.
- - - - - - - - discovering accomplices. IV. 331.
Ridings. I. 117.
Right close, writ of. II. 99. III. 195.
- - - - - - - -, *secundum consuetudinem manerii*, writ of. III. 195.
- - - - *de rationabili parte*, writ of. III. 194.
- - - -, mere writ of. III. 193.

Right of advowſon, writ of. III. 243. 250.
- - - - - dower, writ of. III. 183.
- - - - - poſſeſſion. II. 196.
- - - - - property. II. 197.
- - - - - ward, writ of. III. 141.
- - - -, patent, writ of. III. 141. i.
- - - -, petition of. I. 128. III. 256. IV. 437.
- - - -, *qua dominus remiſit curiam*, writ of. III. 195. iii. vi.
- - - - *ſur diſclaimer*, writ of. III. 233.
Rights. I. 122.
- - - -, bill of. I. 128. IV. 440.
- - - - of perſons. I. 122.
- - - - - things. II. 1.
Riot. IV. 125. 142. 146.
Riot-act. IV. 142, 143. 440.
Riotous aſſemblies, felonious. IV. 142.
Rivers, annoyances in. IV. 167.
- - - -, banks of, deſtroying. IV. 244. 246.
- - - -, ſluices on, deſtroying. IV. 144.
- - - - thefts on navigable. IV. 239.
Robbery. IV. 242.
Roberds-men. IV. 245.
Roguery, incorrigible. IV. 169.
Rogues. IV. 169.
Romney-marſh, laws of. III. 74.
Roots, deſtroying of. IV. 246.
- - - -, ſtealing of. IV. 233.
Rope-dancers. IV. 167.
Routs. IV. 146.
Royal aſſent. I. 154. 185.
- - - - family. I. 219. 225.
- - - - - - - - marriages of. I. 225*. IV. 117.
- - - - fiſh. I. 223. 290.
- - - - mines. I. 295.
Rule of court. III. 304. xi.
Rural dean. I. 383.
- - - - deanery. I. 112.
Ryder to a bill. I. 183.

S

Sabbath-breaking. IV. 63.
Saccularii. IV. 242.
Sacrament, reviling of. IV. 50.
Sacramentum deciſionis. III. 342.
Safe conducts. I. 259.
Safe-conducts, violation of. IV. 68.
Saint Martin *le grand*, court of. III. 80.
Saladine tenth. I. 309.
Sale. II. 9. 446.
- - - of diſtreſs. III. 14.
Salt-duty. I. 322.
Salvage. I. 293. II. 458. 460.
Sanction of laws. I. 56.
Sanctuary. IV. 332. 365. 436.
Sark, iſland of. I. 107.
Satiſdatio. III. 291.
Satisfaction, entry of, on record. IV. 428.
Saxon laws. I. 64. IV. 410. 412.
Scale of crimes and puniſhments. IV. 18.
Scandal or impertinence in bills in equity. III. 442.
Scandalum magnatum. I. 402. III. 123.
Schire men. I. 398.
Schiſm. IV. 52.
Schoolmaſter. I. 453. IV. 54.
Sciences auxiliary to the ſtudy of the law. I. 33.
Scire facias againſt bail. III. 416.
- - - - - - - in detinue. III. 413.
- - - - - - - to hear errors. III. xxxii.
- - - - - - - - - remove an uſurper's clerk. III. 248.
- - - - - - - - - repeal letters patent. III. 261.
- - - - - - - - - revive a judgment. III. 421.
- - - - *feci*. III. xxxii.
Scold, common. IV. 169.
Scotland. I. 95. IV. 292. 304. 427.
Scots, or aſſeſſments. III. 74.
- - - - peers, their election. I. 169. IV. 117.
Scripture, ſcoffing at. IV. 59.
Scutage. I. 310. II. 74.
Se defendendo, homicide. I. 130. IV. 183.
Sea-banks, deſtroying. IV. 244. 246.
Seal, counterfeiting the king's. IV. 83. 89.
- - - -, great. II. 346, 347. III. 46.
- - - - of a corporation. I. 475.
- - - -, privy. II. 347.
Sealing of deeds. II. 305. iii. xii. xiii.

Seals,

Seals, their antiquity. II. 305.
Sea-marks. I. 264.
- - - - - -, deſtroying. I. 294.
Seamen. I. 420*.
Seamen's wages. III. 107.
- - - - - - wills or powers, counterfeiting. IV. 248.
Second deliverance, writ of. III. 150.
- - - - ſurcharge, writ of. III. 239.
Secondary conveyances. II. 324.
- - - - - - uſe. II. 335.
Secretaries of ſtate. I. 338.
Secta. III. 295. 344.
- - - - *ad molendinum, &c.* writ *de*. III. 235.
Secunda ſuperoneratione, writ *de*. III. 239.
Securities for money, their true conſtruction. III. 439.
Security for good behaviour. IV. 251. 256.
- - - - - - - peace. IV. 251. 254.
- - - - - - of perſon. I. 129.
Seduction of women-children. IV. 209. 212.
Seiſin. II. 209.
- - - -, for an inſtant. II. 131.
- - - -, livery of. II. 311. i.
- - - -, writ of. III. 412. II. 359. xix.
Seiſing of heriots, *&c.* III. 15.
Selecti judices. III. 366.
Self-defence. III. 3.
- - - - - - - -, homicide in. I. 130. IV. 183.
Self-murder. IV. 189.
Semi-plena probatio. III. 371.
Senatus conſulta. I. 80. 86.
Senatus decreta. I. 86.
Septennial elections. I. 189. 433.
Sequeſtration in chancery. III. 444.
- - - - - - - - of a benefice. III. 418.
Serjeant, antient. III. 18.
- - - - - - at arms in chancery. III. 444.
- - - - - - - - law. I. 24. III. 27.
- - - - - -, premier. III. 28.
Serjeanty, grand. II. 73.
- - - - - -, petit. II. 81.
Servants. I. 423.
- - - - -, battery of. III. 142.
Servants embezzling their maſters' goods. IV. 230, 231.
- - - - -, firing houſes by negligence. I. 431. IV. 222.
- - - - - larciny by. IV. 230.
- - - - -, maſter when anſwerable for. I. 430, 431. III. 154.
- - - - -, retainer of, I. 425.
- - - - -, tax on. I. 327.
Service, feodal. II. 54.
- - - - -, heriot. II. 422.
Seſſion, great, of Wales. III. 77.
- - - - of gaol-delivery. IV. iii.
- - - - - - *oyer* and *terminer*. IV. i.
- - - - - - parliament. I. 186, 187.
- - - - -, quarter. IV. 271. 274.
Set off. III. 304. IV. 442.
Settlement, act of. I. 128. 216. IV. 440.
Settlements of the poor. I. 362.
Several fiſhery. II. 39.
Severalty, eſtates in. II. 179.
Severance of jointure. II. 186.
Severity of puniſhment. IV. 16.
Sewers, commiſſioners of. III. 73.
Sextons. I. 395.
Sheep, *&c.* ſtealing or killing with intent to ſteal. IV. 239.
Shepway, court of. III. 79.
Sheriff. I. 117. 339. IV. 292. 413. 428.
Sheriff's court in London. III. 80.
- - - - - tourn. IV. 273. 411. 424.
Shifting uſe. II. 335.
Ship-money. IV. 437.
Ships in diſtreſs, plundering them. I. 294. IV. 235. 239.
- - - -, maliciouſly deſtroying. I. 293. IV. 245.
Shire. I. 116.
Shooting at another. IV. 207.
Shop-books. III. 368, 369.
Shrubs, deſtroying of. IV. 246.
- - - -, ſtealing of. IV. 233.
Shroud, ſtealing of. II. 429. IV. 235*.
Si fecerit te ſecurum. III. 274. ix.
Signet, privy. II. 347.
Significavit, writ of. III. 102.
Signing of deeds. II. 305. iii. xii, xiii.
Sign-manual. II. 347.
- - - - - - - -, forging it. IV. 89.

Similitude of hand-writing. IV. 358.
Simony. I. 389. 393. II. 278. IV. 62.
Simple contract, debt by. II. 465.
- - - -, larciny. IV. 229.
Sine-cure. I. 386.
Single bond. II. 340.
- - - - combat. IV. 346.
- - - - voucher. II. xvii.
Sinking fund. I. 332.
Si non omnes. III. 59*.
Six clerks in chancery. III. 443.
Sixpenny deduction from penſions, &c. I. 327.
Slander. III. 123.
Slavery. I. 418. 423.
Slaves. I. 127.
Sledge. IV. 92. 377.
Sluices on rivers, deſtroying. IV. 144.
Small debts, courts for. III. 81. IV. 441.
- - - - tithes. I. 388.
Smoke-farthings. I. 325.
Smuggling. I. 318. IV. 154.
Socage. II. 79. IV. 419.
- - - - free and common. II. 79.
- - - -, guardian. I. 461.
- - - -, villein. II. 98.
Society, it's nature. I. 47.
Sodomy. IV. 215.
Sodor and Man, biſhopric of. I. 106. 112.
Sokemans. II. 100.
Soldiers. I. 408.
- - - - - wandering. IV. 164.
Sole corporations. I. 469.
Solicitor. III. 26.
- - - - - - general. III. 27.
Son aſſault demeſne. III. 120. 306.
Sophia, princeſs, heirs of her body. I. 217.
Socery. IV. 60.
Sovereignty. I. 49.
- - - - - - of the king. I. 241.
Soul-ſcot. II. 425.
South-ſea company, miſbehaviour of it's officers. IV. 234.
- - - - - - fund. I. 331.
Speaker of each houſe of parliament. I. 181.
Speaking with proſecutor. IV. 363.
Special adminiſtration. II. 506.
- - - - bail. III. 287. xxiv.
- - - - bailiff. I. 345.
- - - - baſtardy. I. 454.
- - - - caſe. III. 378.
- - - - demurrer. III. 315.
- - - - imparlance. III. 301.
- - - - jury. III. 357.
- - - - matter in evidence. III. 306.
- - - - occupant. II. 259.
- - - - plea. III. 305.
- - - - property. II. 391.
- - - - ſeſſion. IV. 272.
- - - - ſtatute. I. 86.
- - - - tail. II. 113.
- - - - verdict. III. 377. IV. 360.
- - - - warrant. IV. 291.
Specialty, debt by. II. 465. III. 155.
Specific legacies. II. 512.
- - - - relief in equity. III. 438.
Spiriting away men and children. IV. 219.
Spiritual corporations. I. 470.
- - - - - court. III. 61.
Spiritualties, guardian of. I. 380.
Spoliation. III. 90.
Sponſio judicialis. III. 452.
Springing uſes II. 334.
Squibs. IV. 168.
Stabbing. IV. 193.
Stage plays. IV. 167.
Stake driven through the body. IV. 190.
Stamp duties. I. 324.
Stamping of deeds. II. 297. iii. xii, xiii.
Stamps, forging of. IV. 249.
Standard of coin. I. 278.
- - - - - - - - weights and meaſures. I. 274, 275. IV. 275.
Stannary courts. III. 80.
Staple commodities. I. 315.
Starchamber, court of. I. 230. III. 445. IV. 266. 310. 429. 433. 437.
Starrs. II. 342. IV. 266.
Stated damages. III. 435.
Statham. I. 72.
Statute. I. 85.
- - - - -, guardian by. I. 462.
- - - - -, merchant. II. 160. IV. 426.
- - - - -, rolls. I. 182.

Statute ſtaple. II. 160. IV. 428.
---------, recognizance in nature of. II. 160. 342. IV. 431.
Statutes of a corporation. I. 475.
Staundforde. I. 72.
Stealing an heireſs. IV. 208.
Sterling. I. 278.
Steward. I. 427.
----, lord high. III. 38.
----------, his court. IV. 261.
----------, in parliament. IV. 260. 263.
----------, of the univerſity, his court. IV. 277.
------ of the houſehold. III. 38.
----------, his court. III. 76. IV. 276.
Stint, common without. II. 34. III. 239.
Stipulatio. III. 291.
Stipulation in the admiralty court. III. 108.
Stirpes, diſtribution *per*. II. 517.
----, ſucceſſion *in*. II. 217.
Stocks for puniſhment. IV. 377.
----, of deſcent, male and female. II. 234.
Stolen goods, receiving, *&c.* IV. 132. 238.
---- marriages. IV. 209.
Stoppage. III. 305.
Stores, embezzling the king's. IV. 101.
Strangers to a fine. II. 356.
Striking in the king's palace, or courts of juſtice. IV. 125. 276.
Study of the law, it's diſcouragements. I. 31.
----------uſes. I. 6.
----------, reſtrained in London. I. 24.
----------, why neglected in the univerſities. I. 16.
Stultifying one's ſelf. II. 291.
Subjection, civil. IV. 28.
Subinfeudation. II. 91.
Subornation of perjury. IV. 137.
Subpoena ad teſtificandum. III. 369.
---- *duces tecum.* III. 382.
---- in equity. III. 445.
Subpoena in equity, it's original. III. 52.
Subſcription of witneſſes. II. 378.
Subſcriptions, unlawful. IV. 117.
Subſequent conditions. II. 154.
------- evidence. III. 403. 454, 455.
Subſidies, eccleſiaſtical. I. 312.
------, lay. I. 308. 311. IV. 423.
------, on exports and imports. I. 316.
Subſtraction of conjugal rights. III. 94.
---------- legacies. III. 98.
---------- rents and ſervices. III. 230.
---------- tithes. III. 88. 102.
Succeſſion *ab inteſtato*. II. 516.
------- to goods and chattels. II. 430.
---------, the crown. 197. IV. 440.
Sufferance, eſtate at. II. 150.
Suffrage, who entitled to. II. 171.
Suggeſtion for prohibition. III. 113.
------, proſecution by. IV. 309.
Suicide. IV. 189.
Suit and ſervice. II. 54.
--- at law. III. 116.
--- in equity. III. 442.
---, or witneſſes. III. 295. II. xvii.
Summary convictions. IV. 280.
Summoners. III. 279. II. xiv. xviii. III. iii. xvi.
Summons. III. 279. vii.
------ before conviction. IV. 281.
------ to parliament. I. 149, 150.
Sumptuary laws. IV. 170.
Sunday, no juridical day. III. 278. 290.
Superſedeas, writ of. I. 353.
Superſeding commiſſions of bankrupt. II. 488.
Superſtitious uſes, information of. III. 228.
Supplemental bill in equity. III. 448.
Suppletory oath. III. 371.
Supplicavit. IV. 253.
Supplies. I. 308.
Supremacy. IV. 430.

Supremacy, oath of. I. 368.
- - - - - - - - - - -, refuſing it. IV. 115.
Supreme magiſtrates. I. 146.
- - - - - power. I. 49. 146.
Surcharge of common. III. 237.
Surplus of inteſtates' effects. II. 514.
Sur-rebutter. III. 310.
Sur-rejoinder. III. 310.
Surrender, deed of. II. 326.
- - - - - - of bankrupt. II. 481.
- - - - - - - copyholds. II. 365. 368.
Surveyors of highways. I. 357.
Survivorſhip. II. 183. vii.
- - - - - - - - of things perſonal. II. 399.
Suſpenſion of *habeas corpus* act. I. 136.
Suſ. per col. IV. 403.
Swans, ſtealing of. II. 394. IV. 236.
Swearing, profane. IV. 60.
- - - - - - the peace. IV. 256.
Sweinmote, court of. III. 72.
Sycophants. IV. 236*.
Syngrapha. II. 296.
Synods. I. 279.

T

Tail after poſſibility of iſſue extinct. II. 124.
- - - female. II. 114.
- - - general. II. 113. vi.
- - - male. II. 114.
- - - ſpecial. II. 113.
- - -, tenant in. II. 112.
Taking, felonious. IV. 230. 232.
- - - - -, unlawful. III. 145.
Tale, or count. III. 293.
Tales de circumſtantibus. III. 365. xiv. IV. 354.
- - - - - - - - - - - - - -, writ of. III. 364.
Talionis lex. IV. 12.
Talliage. I. 311. IV. 419. 426.
Tariff. I. 314.
Taxation by the houſe of commons. I. 169.
Taxes. I. 139. 308. IV. 426. 439.
- - - -, their annual amount. I. 328. 333.
Taylor, common, action againſt. III. 165.
Technical words in indictments. IV. 306.
Temporalities of biſhops, their cuſtody. I. 282. IV. 421.
- - - - - - - - - - - - - - - - - - - reſtitution. I. 380. IV. 421.
Tenant. II. 59.
- - - - - to the *praecipe.* II. 359. 362.
Tender of amends. III. 16.
- - - - - - - iſſue. III. 313.
- - - - - - - money. I. 277. III. 303.
- - - - - - - oaths. 368. IV. 124.
- - - -, plea of. III. 303.
Tenement. II. 16. 59.
- - - - - - - entailable. II. 113.
Tenemental lands. II. 90.
Tenendum of a deed. II. 298. i.
Tenths, eccleſiaſtical. I. 284. IV. 107.
- - - - -, temporal. I. 309.
Tenure, diſturbance of. III. 242.
Tenures, antient. II. 59.
- - - - -, modern. II. 78.
Term in law, eſſoign day of. III. 278.
- - - - - - - - - -, firſt day of. III. 278.
- - - - - - - - - -, original of. III. 275.
- - - - - - - - - -, returns of. III. 277.
- - - - of years. II. 143. iii. vi. IV. 430.
Terminum qui praeterìit, writ of entry *ad.* III. 176. 183.
Termor. II. 142.
Terre-tenant. II. 91. 328.
Teſt act. IV. 59. 439.
Teſtament. II. 11, 12. 373. 489. 499. IV. 424. 430.
Teſtamentary cauſes. III. 95.
- - - - - - - - guardian. I. 462. II. 88.
- - - - - - - - - juriſdiction in equity. III. 437.
- - - - - - - - - - - - - - - - - - ſpiritual courts. III. 97. IV. 421.
Teſtamento annexo, adminiſtration *cum.* II. 504.
Teſtatum capias. III. 283. xviii.
Teſte of writs. I. 179. III. 274. append. *paſſim.*
Teſtes, proof of will *per.* II. 508.
- - - -, trial *per.* III. 336.
Theft. IV. 229.

Theft, it's punishment. IV. 236*, 420.
Theft-bote. IV. 133. 363.
Thedosian code. I. 81.
Things personal. II. 384.
- - - - real. II. 16.
- - - - right of. II. 1.
Threatening letters. IV. 137. 144.
Threats. III. 120.
- - - - - of accusation, to extort money. IV. 136.
Timber. II. 281.
- - - - - trees, stealing. IV. 233.
- - - - - - - -, destroying. IV. 247.
Tippling. IV. 64.
Tithes. I. 388. II. 24.
- - - -, cognizable in equity. III. 437.
- - - - of forest land. III. 48.
- - - -, original distribution of. I. 384.
- - - -, subtraction of. III. 88. 102.
Tithing. I. 114. IV. 411.
Tithing-man. I. 115. 406.
Title of acts of parliament. I. 183.
- - - to lands. II. 195.
- - - - - - -, pretended, selling or buying. IV. 136.
- - - - - - the crown. I. 190.
- - - - - - things personal. II. 400.
Toleration. IV. 52, 53. 440.
Tolt, writ of. III. 34. 195. i.
Tongue, cutting out or disabling. IV. 206, 207.
Tonnage. I. 316. IV. 437.
Tonsura clericalis. IV. 367.
Torts, actions on. III. 117.
Torture. I. 133. IV. 325.
Tourn of the sheriff. IV. 273. 411. 424.
Tout temps prist. III. 303.
Town. I. 115.
Trade, it's progress in England. IV. 419. 424. 428. 431, 432. 438.
- - - -, offences against. IV. 154.
- - - -, offensive. IV. 167.
- - - -, unlawful exercise of. I. 427. IV. 159*.
Tradesmen. I. 407.
- - - - -, actions against. III. 165.
Traitors. II. 499. IV. 75.
Transitory actions. III. 294.
Transportation. I. 137. IV. 371. 377. 401.
Transportation, returning from. IV. 132. 371.
Traverse of indictment. IV. 351.
- - - - - - offices. III. 260.
- - - - - - plea. III. 312.
Treason, appeal of. IV. 314.
- - - - -, high. IV. 75. 428.
- - - - -, misprision of. IV. 120.
- - - - -, petit. IV. 75. 203.
- - - - -, trials in. IV. 351. 440.
Treasurer, lord high. III. 38. 44. 56.
- - - - - - - - - - -, killing him. IV. 84.
Treasure-trove. I. 295.
- - - - - - - -, concealment of. I. 297. IV. 121.
Treaties, leagues, and alliances. I. 257.
Trebucket. IV. 169.
Trees, destroying. IV. 246, 247.
- - - -, stealing. IV. 233.
Tresayle. III. 186.
Trespass, costs in. III. 401.
- - - - - on lands. III. 208, 209.
- - - - - - - the case, action of. III. 52. 122.
- - - - - *vi et armis*, action of. III. 120, 121. 123.
Trespassers *ab initio*. III. 15.
Trial. III. 330. IV. 342. 411.
- - -, new. III. 387. IV. 361. 438.
Triennial elections. I. 189. 433.
- - - - - parliaments. I. 153. 430. 432.
Trinity, denial of. IV. 50.
Trinoda necessitas. I. 263. 357. II. 102.
Triors, lords. IV. 262, 263.
- - - - of jurors. III. 263.
Triplicatio. III. 310.
Trithing. I. 117.
Triverbial days. III. 424.
Trover and conversion, action of. III. 152. IV. 363, 364.
Truce, breakers of. IV. 68.
- - -, conservators of. IV. 69.
Trusts. II. 356. v, vi.

Truſts, where cognizable. III. 431. 439.
Tub-man, in the exchequer. III. 28.
Tumultuous petitioning. I. 143. IV. 147.
Turbary, common of. II. 34.
Turnips, ſtealing. IV. 233.
Turnpikes, deſtroying of. IV. 144.
Tutor. I. 306. 453. 460.
Twelve tables, laws of. I. 80.
Two witneſſes, when neceſſary. III. 370. IV. 356.
Tyranny. I. 126. 133.

V U

Vacancy of the throne. I. 212. 214.
Vacarius, Roger. I. 18.
Vacating records. IV. 128.
Vacations. III. 276.
Vadium mortuum. II. 157.
- - - - *vivum*. II. 157.
Vagabonds. IV. 169.
Vagrants. IV. 169.
- - - - -, harbouring them. IV. 170.
Valor beneficiorum. I. 284.
- - - *maritagii*. II. 70. 88.
Valuable conſideration. II. 297.
Valvaſors. I. 403.
Vaſal. II. 53.
Ubiquity of the king. I. 270.
Udal right. II. 45.
Venary, beaſts of. II. 415.
Venire facias, writ of. III. 352. vii. xiii. IV. 318. 351. iii.
Ventre inſpiciendo, writ *de*. I. 456.
- - - *ſa mere*, children in. I. 130.
Venue. III. 294.
- - - -, when changed. III. 294. 384.
Verberation. III. 120.
Verderors. III. 71, 72.
Verdict. III. 377. viii. xiv. IV. 360. iii. vi.
- - - -, falſe. III. 402. IV. 140.
Verge of the court. III. 76. IV. 276.
Vert, veniſon, and covert, injuries to. III. 171.
Veſted legacy. II. 513.
- - - - remainder. II. 168.
Vetitum namium. III. 149.
Vicar. I. 387.
Vicarages, when eſtabliſhed. I. 387. IV. 428.
Vicarial tithes. I. 388.
Vice-admiralty courts. III. 69.
Vicinage, common becauſe of. II. 33.
Vicineto, jury *de*. III. 385.
Vicontiel writs. III. 238.
Vidames. I. 403.
View by jurors. III. 299. 358.
- - - of frankpledge. IV. 279.
Vill. I. 114.
Villein. II. 92. IV. 420.
- - - - in groſs. II. 93.
- - - - regardant. II. 93.
- - - - ſervices. II. 61.
- - - - ſocage. II. 61. 98.
Villenage. II. 89. 92.
- - - - -, privileged. II. 98.
- - - - -, pure. II. 61. 90.
Villenous judgment. IV. 136.
Vinculo matrimonii, divorce *a*. III. 94.
Viner, Mr. his inſtitution. I. 27.
Violating the queen, *&c*. I. 222, 223. IV. 81.
Violent preſumption. III. 371.
Virge, tenant by. II. 148.
Virgin Mary, a civilian and canoniſt. I. 21.
Viſcount. I. 398.
Viſitation books of heralds. III. 105.
Viſitor. I. 480.
- - - - - of civil corporations. I. 481.
- - - - - - colleges. I. 482.
- - - - - - hoſpitals. I. 482.
Viſné. III. 294. IV. 350.
Vivo vadio, eſtate *in*. II. 157.
Umpire. III. 16.
Unanimity of juries III. 376. IV. 414.
Uncertainty of the law. III. 325.
Uncore priſt. III. 303.
Underſheriff. I. 345.
Underwood, ſtealing. IV. 233.
Union, articles of. I. 96.
- - - - of Great Britain. I. 93. IV. 427. 440.
Unities of joint eſtates. II. 180.
Univerſitates. I. 469.
Univerſity. I. 471.
- - - - - - -, burgeſſes of. I. 174.
- - - - - - -, chancellor of, his certificate. III. 335.

University, courts of. III. 83. IV. 277.
- - - - - - -, right of, to popiſh advowſons. III. 251.
- - - - - - -, ſtudy of the law in. I. 26.
Unknown perſons, larciny from. IV. 236. 359.
Voir dire, oath of. III. 332.
Voluntary eſcape. III. 415. IV. 130.
- - - - - - juriſdiction. III. 66.
- - - - - - manſlaughter. IV. 191.
- - - - - - oaths. IV. 137.
- - - - - - waſte. II. 281.
Vouchee, in recoveries. II. 358. xviii.
Voucher. III. 300.
- - - - - -, in recoveries. II. 358. xviii.
Uſes. II. 137. 271. 327. III. 52. IV. 427. 429 430.
- - -, covenant to ſtand ſeiſed to. II. 338.
- - -, deeds to lead or declare. II. 339. 363. ix, x.
- - -, ſtatute of. II. 332. IV. 430.
Uſurpation of advowſon. III. 242.
- - - - - - - - - franchiſes or offices. III. 262.
Uſura maritima. II. 458.
Uſury. II. 454. IV. 116. 158.
Uſus fructus. II. 327.
Uterinus frater. II. 232.
Uttering falſe money. IV. 89. 99.
Vulgaris purgatio. IV. 342.

W

Wager of battel. III. 337. 339. iv. IV. 346. 418. 421. 424.
- - - - - - law. III. 341. IV. 414. 424.
Wagering policies. II. 460.
Wages of members of parliament. I. 174.
- - - - - - ſervants. I. 428.
Waifs. I. 297.
Wainage. IV. 379.
Wales. I. 93. IV. 427. 431.
- - - -, courts of. III. 77.
- - - -, part of England. I. 99.
- - - -, prince of. I. 223.
- - - - - - - - - -, compaſſing and imagining his death. I. 223. IV. 76.
- - - -, princeſs of. I. 223.
Wales, princeſs, violating her. I. 223. IV. 81.
Wandering ſoldiers and mariners. IV. 164.
Want. IV. 31.
Wapentakes. I. 116.
War and peace, right of making. I. 257.
- - -, articles of. I. 415.
- - -, levying againſt the king. IV. 81.
Ward by conſtables, &c. I. 356. IV. 292. 426.
Wards and liveries, court of. III. 258.
Wardſhip in chivalry. II. 67. IV. 418. 420, 421.
- - - - - - - - copyholds. II. 97.
- - - - - - - - ſocage. II. 87.
Warrant. I. 137. IV. 290.
- - - - - of attorney, to confeſs judgment. III. 397.
Warrantia chartae. III. 300.
Warranty of chattels perſonal. II. 451.
- - - - - - - - - goods ſold. III. 166.
- - - - - - - - - lands. II. 300. i. xv. xviii.
Warren, beaſts and fowls of. II. 38.
- - - - -, robbery of. IV. 236.
- - - - - - - - - - -, in diſguiſe. IV. 144.
Waſte. II. 281. III. 223.
- - - -, how prevented in equity. III. 438.
- - - -, impeachment of. II. 283.
- - - - lands. II. 14. 90.
- - - -, writ of. III. 227.
Watch. I. 356. IV. 292. 426.
Water. II. 14. 18.
Watermen overloading their boats. IV. 192.
Water-ordeal. IV. 342.
Ways. II. 35.
- - - - and means, committee of. I. 307.
- - - -, diſturbance of. III. 241.
Weights and meaſures. I. 274. IV. 275. 424.
- - - - - - - - - - - - -, falſe. IV. 159.

Weregild. IV. 188. 313. 413.
Wells, property in. II. 5.
Weſt-Saxon-lage. I. 65. IV. 412.
Whales, property of. I. 223.
Wharfs. I. 264.
Whipping. IV. 372. 377.
White rents. II. 43.
Whole blood. II. 227.
Widow's chamber. II. 518.
Wife. I. 433.
- - -, battery of. III. 140.
Will, defect of. IV. 20.
- - -, eſtates at. II. 145.
- - -, of the lord. II. 95. 147.
- - -, vitious. IV. 21.
Wills and teſtaments. II. 11, 12. 373. 489. 499. IV. 424. 430.
Wincheſter meaſure. I. 274.
Window tax. I. 325.
Wine, adulteration of. IV. 162.
- - - - licences, I. 289.
Witchcraft. IV. 60. 436.
Withdrawing from allegiance. IV. 87.
Withernam. III. 129. 146. 413.
Witneſſes. III. 369.
- - - - - - for priſoners. IV. 359. 441.
- - - - - -, tampering with. IV. 126.
- - - - - -, their expenſes. III. 369. IV. 362.
- - - - - - to deeds. II. 307.
- - - - - - - wills. II. 501.
Witneſſes, trial by. III. 336.
- - - - - -, two, where neceſſary. III. 370. IV. 350.
Wittena-gemote. I. 148. IV. 412.
Women, appeals by. IV. 424.
- - - - -, children, ſtealing or ſeduction of. IV. 209.
- - - - -, guilty of clergyable felonies. IV. 369.
- - - - -, jury of. III. 362. IV. 395.
Woodmote, court of. III. 71.
Wood-ſtealing. IV. 233.
Wool, *&c.* tranſporting. IV. 154. 428.
Words, action for. III. 123.
- - - - -, coſts in actions for. III. 401.
- - - -, treaſonable. IV. 79.
Workhouſe. IV. 370.
Worthieſt of blood. II. 213.
Wounding. III. 121. IV. 216.
Wreck. I. 291. II. 14. III. 106. IV. 235.
Writ. III. 273.
- - - - cloſe. II. 346.
- - - - of election to parliament. I. 177.
- - - - - - peerage. I. 400.
- - - - patent. II. 346.
Writs, forms of. III. 51. 183. 273. IV. 427.
Writing of a deed. II. 297.
- - - - -, treaſon by. IV. 80.
Writings, ſtealing of. IV. 234.
Written conveyances. II. 297.
- - - - - evidence. III. 368.
Wrongs. I. 122.
- - - - -, private. III. 2.
- - - - -, public. IV. 1.

Y

Year. II. 140.
- - - - and day, in appeals of death. IV. 315. 335.
- - - - - - - - - - - - continual claim. III. 175.
- - - - - - - - - - - - copyhold forfeiture. II. 284.
- - - - - - - - - - - - eſtrays. I. 297.
- - - - - - - - - - - - fines. II. 354.
- - - - - - - - - - - - murder. IV. 197. 306.
- - - - - - - - - - - - wrecks. I. 292.
- - - -, day, and waſte. II. 252. IV. 385.
Yearbooks. I. 72.
Years, eſtates for. II. 140.
Yeomen. I. 406.
York, cuſtom of the province of. II. 518.

INDEX

TO THE

EDITOR's NOTES

IN THIS EDITION.

☞ *The first number denotes the Volume, the second the Page, and the Numbers after* n. *the Notes.*

A

ABATEMENT, pleas in, iii. 302. *n.* 3.
Abdication, Scotch declaration of, i. 211. *n.* 3.
Abeyance, ii. 107. *n.* 2, 3.
Accomplice, when admitted a witness, iv. 331. *n.* 5.
Actions under 40*s.* stayed, iii. 36. *n.* 2.
Advocates, conduct of, and reasons for their admission, iv. 356. *n.* 7.
———, action against, iii. 164. *n.* 6.
Advowsons, how conveyed, and who entitled to present to, ii. 22. *n.* 1.
Affidavit to hold to bail must be positive, iii. 287. *n.* 2.
Affirmation of Quakers, iii. 369. *n.* 14.
Age, full, how computed, i. 463. *n.* 4.
Alehouse licences, iv. 64. *n.* 11.
Alien bill, i. 260. *n.* 9.
Alien's duty, i. 316. *n.* 24.
Aliens, rights and disabilities of, i. 372. *n.* 3, 4, 5, 6, 7, 8, 9, 10, 11.
Allegiance, when due, i. 370. *n.* 1, 2.
Allodium, derivation of, ii. 45. *n.* 2.
America, independence of, i. 109. *n.* 17.
Annuities, consideration of, ii. 461. *n.* 17, 18.
Annuity, when a qualification to vote, i. 173. *n.* 30.
———, out of personal property to a man and the heirs of his body, a fee conditional, ii. 113. *n.* 7.
Antient demesne, plea of, ii. 99. *n.* 7.
Appeals of felony, iv. 317. *n.* 5.
Apprentice, i. 426. *n.* 4, 5. 428. *n.* 7. iv 160. *n.* 8.
Appropriations, i. 386. *n.* 21, 22, 23.
Archbishop Abbot's accident in shooting with a long bow, ii. 413. *n.* 5.
Archbishops, privileges of, i. 381. *n.* 12, 13, 14, 15.—i. 405. *n.* 17.
Arguments from inconvenience, effect of, i. 70. *n.* 3.
Arraign, derivation of, iv. 322. *n.* 1.

Arrests,

Arrests, how to be made, iii. 288. *n.* 3.
———, for felonies when justifiable, iv. 293. *n.* 1.
———, protection from, iii. 289. *n.* 4.
Arson, iv. 221. *n.* 1, 2.
Assaults and batteries, a justification may be given in evidence in prosecutions for, iii. 120. *n.* 1.
Assets, marshalling of, ii. 512. *n.* 15.
Assignee, when bound by covenants, ii. 327. *n.* 18.
Assise, grand, number of recognitors in, iii. 351. *n.* 1.
Asportations to constitute larceny, iv. 231. *n.* 4.
Attorney-general, when a party in equity, iii. 428. *n.* 4.
Attorneys, number of, in Norfolk and Suffolk, iii. 25. *n.* 1.
Awards, iii. 17. *n.* 9.

B

Bachelor, derivation of, i. 404. *n.* 14.
Bail, common, when filed, iii. 287. *n.* 1.
—— special, when put in, iii. 290. *n.* 4, 5.
—— how they may surrender the defendant, iii. 292. *n.* 6.
Bailments, ii. 453. *n.* 11, 12.
Bank-notes, possession of forged, felony, iv. 250. *n.* 21.
Bankrupt, his wife's lands how sold, ii. 286. *n.* 15.
———, originally termed an offender, ii. 471. *n.* 1.
———, who may be, ii. 474. *n.* 2, 3, 4, 5, 6. 12.
———, fees of commissioners of, ii. 480. *n.* 17.
———, certificate of, ii. 482. *n.* 21, 22, 23, 24.
———, assignment of his effects, ii. 485. *n.* 25. 27.
———, payments by and to, when valid, ii. 486. *n.* 28, 29.
———, meeting of creditors of, how determine, ii. 486. *n.* 30.
———, assignees, when to verify their account upon oath, ii. 487. *n.* 32.
———, creditors of, how to produce their securities, ii. 487. *n.* 33.
———, may prove the deficiency of a mortgage, ii. 437. *n.* 33.
———, landlord of, his remedies, ii. 487. *n.* 34.
———, debts of, how proved, ii. 488. *n.* 35, 36, 37, 38.
Bankruptcy, acts of, ii. 478. *n.* 7, 8, 9, 10, 11, 12, 13.—ii. 486. *n.* 26.
———, how proved, ii. 480. *n.* 18.
———, different from insolvency, ii. 479. *n.* 14.
Baronets, origin of, i. 403. *n.* 12, 13.
Barons, by what right they originally sat in parliament, i. 398. *n.* 3.
Barons, not necessarily the same with lords of manors, i. 399. *n.* 4. Nor with freeholders, iii. 33. *n.* 1.
Bastards, born during wedlock, i. 457. *n.* 8.
—— how far *filii nullius*, i. 459. *n.* 11, 12.
—— administration to, ii. 506. *n.* 9.
Bastardy-bond, when put in suit, i. 456. *n.* 9.
Battle, trial by, iv. 348. *n.* 1.
Berwick upon Tweed, i. 99. *n.* 9.

Bigamy, iv. 164. *n.* 3, 4.—iv. 305. *n.* 2.
Bill in equity, when amended, iii. 448. *n.* 8.
Bills of exchange upon an ufurious contract, or for a gaming debt, void, ii. 463. *n.* 19.
—— of exchange, alteration of, makes void, ii. 208. *n.* 5.
—— for leſs than five pounds, ii. 468. *n.* 22.
—— ſtamps upon, ii. 468. *n.* 22.
—— verbal acceptance of, ii. 469. *n.* 23.
———, days of grace upon, ii. 469. *n.* 25.
———, notice of diſhonour of, ii. 470. *n.* 26.
———, actions upon, ii. 470. *n.* 27.
Biſhopricks, when elective and donative, i. 379. *n.* 7.
Biſhops' ſees kept vacant, i. 283. *n.* 1.
——— age of, when conſecrated, i. 380. *n.* 9.
——— may be deprived, i. 380. *n.* 10.
——— why not tried in parliament, i. 401. *n.* 8.—iv. 265. *n.* 5.
Bleaching grounds, ſtealing from, iv. 240. *n.* 8.
Boiling to death, iv. 196. *n.* 4.
Bolingbroke, lord, upon the ſtudy of the law, i. 33. *n.* 5.
Bona vacantia not always the property of the king, i. 296. *n.* 9.—i. 299. *n.* 12.
Bond, not binding upon the heir, unleſs he is named, ii. 339. *n.* 14.
——, not an incumbrance upon land, ii. 339. *n.* 14.
——, upon a *turpis contractus*, effect of, ii. 340. *n.* 15.
——, intereſt of beyond the penalty, ii. 341. *n.* 16.
Bribery, iv. 140. *n.* 8.
——— at elections, i. 179. *n.* 48, 49, 50, 51.
Burgage tenures, i. 175. *n.* 36.
Burglary, iv. 225. *n.* 3, 4, 5.
Bye-laws, by whom made, i. 476. *n.* 6.

C

Canon-law, not binding upon the laity, i. 83. *n.* 14.
———, degrees in, i. 392. *n.* 36.
Carriers, iii. 164. *n.* 7.
Caſes for the opinion of the judges, how ſent out of courts of equity, iii. 452. *n.* 11.
Caſtle may include a manor, ii. 19. *n.* 1.
Cattle, ſtealing, what, capital, iv. 240. *n.* 8.
—— maiming of, iv. 246. *n.* 15.
Ceſſion, when it produces a vacancy and lapſe, i. 392. *n.* 37.
Challenges, peremptory, when allowed, iv. 353. *n.* 5, 6.
Chancellor, juriſdiction of, over lunatics, i. 303. *n.* 15.
———, church, patronage of, iii. 48. *n.* 6.
Chancellor, muſt exerciſe his juriſdiction in bankruptcy perſonally, iii. 428. *n.* 3.
Cheſter, earl of, i. 224. *n.* 8.
Children, ſtealing of, iv. 219. *n.* 4.
Chiltern hundreds, ſtewardſhip of, i. 176. *n.* 39.
Cinque ports, precept to, i. 177. *n.* 45.

Cities not originally bishops' fees, i. 114. *n.* 21.
Civil law, i. 19. *n.* 2.
Clergy, right of, to sit in parliament, i. 175. *n.* 37.
——, privileges and disabilities of, i. 377. *n.* 1, 2, 3, 4, 5, 6.
——, when allowed to marry, i. 439. *n.* 10.
——, benefit of, iv. 370. *n.* 2, 3, 4, 5.
Clerk of the peace, removal of, iv. 272. *n.* 11.
Coin, counterfeiting, iv. 90. *n.* 11.
—— foreign, counterfeiting, iv. 89. *n.* 10.
Colleges, majority of electors in, conclusive, i. 478. *n.* 9.
——, lay corporations, i. 472. *n.* 2.
Commendams, i. 393. *n.* 38.
Committees for trying elections, i. 175. *n.* 35.
Commons, signification of the word, i. 158. *n.* 10.
Commons appendant, how depastured, ii. 34. *n.* 13.—iii. 239. *n.* 1.
—— when the lord may approve, ii. 34. *n.* 14.
Commorientibus, cases *de*, ii. 516. *n.* 3.
Consequences of an unlawful act, iv. 26. *n.* 3.
Consideration arising from a moral obligation, ii. 445. *n.* 3.
—— when material in a promissory note, ii. 446. *n.* 4.
Consolidation of customs and excise, i. 316. *n.* 23.
Conspiracies, iv. 137. *n.* 4.
Constable, lord high commission of, i. 355. *n.* 19.
Constitutio in the civil law, definition of, i. 74. *n.* 6.
Contenement, signification of, iv. 379. *n.* 2.
Contingent remainders, ii. 172. *n.* 3.
Contractors disqualified to sit in the house of commons, i. 174. *n.* 42.
Contracts, how bound by earnest, ii. 448. *n.* 6.
——, when necessary to be in writing, ii. 448. *n.* 7.—iii. 158. *n.* 3.
Convocations, i. 280. *n.* 24.—iii. 67. *n.* 1.
Copyholds, origin of, ii. 96. *n.* 4.
——, arbitrary fines of, ii. 98. *n.* 6.
——, devises of, without previous surrender, when good, ii. 368. *n.* 1.
——, cannot be intailed without a custom, ii. 372. *n.* 5.
——, interest of the surrenderee, before admittance, ii. 368. *n.* 2.
——, will pass by a will without three witnesses, ii. 376. *n.* 2.
——, heirs title to, complete before admittance, ii. 371. *n.* 4.
——, for lives how renewable, ii. 370. *n.* 3.
Cornwall, duke of, i. 224. *n.* 10.
Coroner, antient dignity of, i. 347. *n.* 10.
——, may act as a justice, i. 353. *n.* 14.
Corporations may have a name by implication, i. 475. *n.* 3.
Corporation and test acts, iv. 58. *n.* 2, 3, 4.
Costs, iii. 214. *n.* 5, 6, 7.—iii. 400. *n.* 5, 6.
—— awarded by justices, iv. 283. *n.* 1.
——, none allowed in misdemeanours, iv. 362. *n.* 10.
Counsel, when allowed, iv. 356. *n.* 7.

Counſel, king's, licence for, iii. 27. *n.* 2.
Counties, what cities and towns are, i. 120. *n.* 23.
Courts of conſcience, iii. 81. *n.* 2.
Covenants binding upon executors and adminiſtrators, though not named, ii. 304. *n.* 2.
Crimes and injuries, diſtinction betwixt, iv. 5. *n.* 3.
———, when juſtified in law by compulſion, iv. 30. *n.* 5.
Criminal converſation, action for, iii. 140. *n.* 12.
Croſs remainders, ii. 381. *n.* 15.
Crown lands, i. 287. *n.* 6.
Culprit, conjecture concerning its origin, iv. 340. *n.* 1.
Curates in conſequence of a title, i. 394. *n.* 40.
Curteſey, tenant by, derivation of, ii. 126. *n.* 4.
———————, in gavel-kind, ii. 228. *n.* 7.
Cuſtoms muſt be beyond time of memory, i. 76. *n.* 10.
——— not contrary to ſtatute, i. 77. *n.* 11.
——— not uncertain, i. 78. *n.* 12.
——— conſtrued ſtrictly, i. 78. *n.* 13.
——— revenue, origin of, i. 313. *n.* 13.

D

Deacons, i. 388. *n.* 24.
Dead bodies, ſtealing, ii. 429. *n.* 4.
Deanries, i. 382. *n.* 16, 17.
Death, civil, i. 133. *n.* 11.
Debt, action of, upon a ſimple contract, iii. 154. *n.* 3.
Debts, how paid by perſonal repreſentatives, ii. 511. *n.* 13, 14, 15.
Decree, minutes of, how amended, iii. 451. *n.* 9.
Deeds, ancient, ii. 304. *n.* 3. ii. 308. *n.* 4.
Delegates, i. 280. *n.* 25.
Deſcent, immediate, from a ſon to a father, in what caſes, ii. 212. *n.* 7.
———, to No. 10 in preference to No. 11, ſupported, ii. 240. *n.* 17.
———, when broken by a deviſe, ii. 241. *n.* 1.
Deſcents, new table of, ii. 240. at the end of *n.* 17.
Deodands, i. 301. *n.* 13, 14.
Deviſes, lapſed, ii. 379. *n.* 11.
Dioichia and *paroichia*, i. 111. *n.* 18.
Diſcharged benefices what, i. 285. *n.* 4.
Diſcovery of the longitude and North paſſage, premiums for, i. 421. *n.* 12.
Diſpenſations, i. 381. *n.* 13.
Diſtreſs, cannot be made of a horſe with the rider, iii. 8. *n.* 3.
———, may be of cattle ſent to agiſt, and horſes and carriages at livery ſtables, iii. 9. *n.* 4.
———, of implements of trades, iii. 9. *n.* 5.
———, when to be ſold, iii. 14. *n.* 7.
———, when irregular, trover will not lie, iii. 15. *n.* 8.

Distribution of intestate personal property, ii. 516. *n.* 23.
———— - *per stirpes*, when, ii. 517. *n.* 24.
Divorce a mensa et thoro, iii. 94. *n.* 3.
Divorces, i. 441. *n.* 13, 14.
Docket, striking, ii. 480. *n.* 16.
Dogs, stealing of, iv. 236. *n.* 6.
Donatio causa mortis, of what, ii. 514. *n.* 21.
Donatives, properties of, ii. 23. *n.* 2, 3.
Dower, forfeited by an assignment of the wife, ii. 130. *n.* 9.
———, not out of a trust estate, ii. 132. *n.* 11.
———, when wife shall have choice between dower and a devise, ii. 138. *n.* 13.
———, infant may bar herself of, by assenting to a jointure, ii. 138. *n.* 14.
Dukes, when created, i. 397. *n.* 1.
Dwelling-house, stealing in, iv. 242. *n.* 10.

E

Egyptians, statute against, repealed, iv. 4. *n.* 1.; iv. 166. *n.* 6.
Ejectment, by one tenant in common against the other, ii. 194. *n.* 9.
———, when barred by an outstanding term, iii. 204. *n.* 2.
———, practice, costs and new trial in, iii. 205. *n.* 4.
———, devisee may defend as a landlord in, under 11 *Geo.* 2. *c.* 19. iii. 206. *n.* 3.
Elections, how to be appointed, i. 178. *n.* 46.
———, ought to be free, i. 178. *n.* 47.
———, how continued, i. 180. *n.* 53.
Electors and elected, residence of, i. 172. *n.* 27.
———, oaths of, i. 180. *n.* 53.
———, in corporations restrained by a bye-law, i. 475. *n.* 4.
Embassador, inviolability of, i. 254. *n.* 4, 5, 6, 7.
Embezzlement by servants and clerks, felony, iv. 230. *n.* 3.
Emblements, may be devised by an incumbent, ii. 123. *n.* 2.
Entry, actual, when necessary in ejectments, iii. 203. *n.* 1.
Equality, incompatible with good government, i. 407. *n.* 23.
Equity in the English law, what, i. 62. *n.* 11.
Error, writ of, from the exchequer, iii. 410. *n.* 2.
Escheat, trust estates do not, ii. 246. *n.* 3.
Esquires, who, i. 406. *n.* 18, 19, 20.
Estates-tail, cannot be created in personal property, ii. 113. *n.* 7.
————, how created by will, ii. 115. *n.* 10.
Estates pur autre vie, ii. 259. *n.* 1, 2.
Estrays, i. 296. *n.* 10, 11.
Evidence, iii. 367. *n.* 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24.
———— in usury and forgery, iv. 157. *n.* 4.
Examination, last, enlarged, ii. 481. *n.* 19.
Excise, i. 318. *n.* 26.
Execution, when two writs are delivered to the sheriff on the same day, ii. 447. *n.* 5.

Execution, under an, how the ſheriff may aſcertain the property, iii. 417. *n.* 3.
———, landlord, how far indemnified, *ib.*
———, of *fieri facias*, how affected by an extent, iii. 420. *n.* 4.
———, of criminals, how ordered, iv. 404. *n.* 1.
Executor, what acts he may do, before probate, ii. 507. *n.* 10.
———, *de ſon tort*, ii. 508. *n.* 11.
———, goods of the teſtator not liable in an action againſt, in his own right, ii. 511. *n.* 12.
———, when a truſtee for the next of kin, ii. 515. *n.* 22.
Executory deviſes, ii. 174. *n.* 4, 5.

F

Falſe pretences, iv. 158. *n.* 6.
Farmer, when liable for cattle ſent to agiſt, ii. 453. *n.* 11.
Father, not entitled to receive a legacy left to a child, i. 461. *n.* 1.
Fee-farm. ii. 43. *n.* 27.
Fee-ſimple, created by will without words of inheritance, ii. 108. *n.* 4.
Feigned iſſue, ought not to be tried without conſent of the court, iii. 452. *n.* 10.
Feme covert, communicates no rank to her huſband, i. 401. *n.* 9, 10.
———, when liable for her own acts, i. 443. *n.* 19. 21, 22.
———, in what inſtances ſhe may convey by a fine, or a recovery, ii. 355. *n.* 2.
———, may have the power of appointment of lands by will, ii. 375. *n.* 1.
———, may bequeath by will perſonal property given to her ſeparate uſe, ii. 497. *n.* 4.
———, arreſted with her huſband upon meſne proceſs, how relieved, iii. 414. *n.* 1.
———, when indemnified for crimes committed with her huſband, iv. 29. *n.* 4.
Feudal ſyſtem, acquaintance with, neceſſary to a knowledge of the conſtitution, ii. 44. *n.* 1.
Fine, the chief uſe in levying, ii. 354. *n.* 1.
Fines and recoveries, ii. 357. *n.* 3. 4, 5.
Fire, accidents by, iii. 229. *n.* 3.
Fire-works, iv. 168. *n.* 8.
Firſt fruits and tenths, i. 285. *n.* 2, 3.
Fiſhery, ſeveral, ii. 39. *n.* 22, 23.
Fixtures, when executor entitled to, ii. 281. *n.* 10.
Foreſts and chaſes, ii. 38. *n.* 17. 19.—iii. 73. *n.* 1.
Forfeiture in high treaſon reſtored, iv. 385. *n.* 3.
Forgery, iv. 249. *n.* 18, 19, 20.
Fox-hunting over another's ground juſtifiable, iii. 213. *n.* 4.
Fraudulent deviſes, exceptions to the ſtatute of, ii. 378. *n.* 9.
Freehold eſtates, what, ii. 104. *n.* 1.

Freehold, value of, to vote, i. 172. *n.* 28.
———, to vote, how aſſeſſed to the land tax, i. 173. *n.* 32.
Free-warren, ii. 39. *n.* 20, 21.

G

Game, Mr. J. Blackſtone's doctrine reſpecting, controverted, ii. 418. *n.* 8.; ii. 419. *n.* 10, 11.
———, qualifications to kill, iv. 175. *n.* 13, 14.
Game-keepers, ii. 418. *n.* 9.
Gaming, iv. 173. *n.* 10, 11.
———, ſtatute of, i. 88. *n.* 20.
Gaoler, not to ſuffer tippling or gaming, i. 346. *n.* 9.
Gentlemen, all the ſons equally, i. 406. *n.* 21.
Gleaning upon another's ground illegal, iii. 213. *n.* 3.
Goods ſtolen, property in, ii. 450. *n.* 8.
Grants, voluntary, when valid, ii. 296. *n.* 1.
Grenville's act, i. 180. *n.* 54.
Guardian in ſocage, i. 462. *n.* 2.
——— teſtamentary, i. 462. *n.* 3.
——— how appointed to an infant by the court of chancery, iii. 427. *n.* 1.

H

Habeas corpus act, carried by a fraud, iii. 136. *n.* 10.
———, efficacy in caſes of private confinement, iii. 138. *n.* 11.
Hackney coaches, i. 326. *n.* 36.
Half blood, cannot inherit, i. 71. *n.* 5.—ii. 223. *n.* 16.
———, no impediment in the deſcent of honours, or in the ſucceſſion to perſonal property, ii. 253. *n.* 15.; ii. 516. *n.* 23.
Hanging in chains, iv. 202. *n.* 5.
Hand-writing, when evidence in high-treaſon, iv. 358. *n.* 8.
Heir at law, referable to a ſpecific eſtate, ii. 223. *n.* 10.
Highways, power in juſtices to widen or divert, i. 139. *n.* 15. i. 358. *n.* 21.
Honeſte vivere, intepretation of, i. 40. *n.* 2.
Honorary freemen, i. 175. *n.* 36.
Horſe races, iv. 173. *n.* 11.
Horſes, ſale of, ii. 451. *n.* 9.—iii. 165. *n.* 8.
Houſe-tax, i. 324. *n.* 34.
Huſband, may grant to his wife, i. 442. *n.* 16.
———, when liable for his wife's debts, i. 442. *n.* 17, 18, 19.
———, not a witneſs for or againſt his wife, and *vice verſa*, i. 443. *n.* 20.

Husband, right of, to the wife's fortune, and choses in action, ii. 433. *n.* 1, 2, 3.
——— and wife, and a third person, grant to, ii. 182. *n.* 1.

I

Impeachment of a commoner for a capital crime, iv. 260. *n.* 1.
———, evidence in, iv. 261. *n.* 2.
———, king's power to pardon in, iv. 399. *n.* 2.
———, commons must demand judgment in, *ib.*
———, does not abate by a dissolution, *ib.*
Indictments and informations, when tried at *nisi prius*, iv. 309. *n.* 3.
Infant, en ventre sa mere, privileges of, i. 130. *n.* 9.
Infants, for what liable, i. 465. *n.* 5, 6.
———, when of age to bequeath personally, ii. 497. *n.* 1.
Inhabitants, resident six months in order to vote, i. 175. *n.* 36.
Inheritances, how divested by subsequent births, ii. 208. *n.* 5.
Injunction in equity, effect of, iii. 443. *n.* 7.
Inns of court and chancery, i. 25. *n.* 3.
Innkeepers, liable for their guest's property, i. 430. *n.* 11.
Insolvent debtors, iii. 416. *n.* 2.—iv. 285. *n.* 1.
Insurance, ii. 459. *n.* 14, 15, 16.
Joint-tenancy, how created, ii. 193. *n.* 8.
Joint-tenants, proceedings betwixt, ii. 183. *n.* 2.
———, where no survivorship betwixt, ii. 184. *n.* 3.
———, will by before partition, ii. 186. *n.* 4.
———, residuary legatees and executors, ii. 398. *n.* 2.
———, committing suicide, the whole estate is vested in the king, ii. 409. *n.* 1.
Jointure, not forfeited by adultery, ii. 139. *n.* 15.
Ireland, origin of the title of king of, i. 99. *n.* 10.
———, English statutes binding, i. 104. *n.* 13.
———, independence of, i. 104. *n.* 14.
Irish parliament, account of, i. 103. *n.* 12.
——— peer tried by an English jury for a crime in Ireland, i. 104. *n.* 13.
Judges, independence of, i. 268. *n.* 13.
———, may sit in the criminal courts in their own counties, iii. 59. *n.* 8.
———, how far counsel for the prisoner, iv. 355. *n.* 8.
Judgment, arrest of, iii. 395. *n.* 2.
——— warrant of attorney, to confess, iii. 397. *n.* 3.
Juries, special, iii. 358. *n.* 5.
———, conjecture respecting the origin of the unanimity of, iii. 376. *n.* 20.
Jurors in London and Middlesex, who, iii. 362. *n.* 6.
Juror withdrawing, effect of, iii. 377. *n.* 21.
Jury, grand, may hear evidence in public, iv. 303. *n.* 1.
Justices of the peace, qualifications of, i. 353. *n.* 12.

Juſtices of the peace, where two muſt act, i. 354. *n.* 15, 16.
———— ————, how puniſhed and protected, i. 354. *n.* 17.
———— ———— ———— conduct with reſpect to alehouſes, iv. 64. *n.* 11.

K

Kin, next of, who, ii. 516. *n.* 23.
Kindred, computation of, by the civil and the canon laws, ii. 207. *n.* 4.
————, ſuch computation not uſeful in a treatiſe of deſcents, ii. 225. *n.* 12.
Kinſman, remoteſt paternal, inherits before the neareſt maternal, ii. 224. *n.* 11.
King's authority over a conquered country, i. 107. *n.* 16.
——'s anſwers to bills in parliament, i. 184. *n.* 62.
——'s declaration againſt popery, i. 234. *n.* 2.
——'s inviolability, i. 246. *n.* 2.
——'s prerogative to grant precedence, i. 272. *n.* 15.
———— ———— with regard to coin, i. 278. *n.* 21, 22.
Kings, when they ſat in courts of juſtice, iii. 41. *n.* 4.
Knight, an infant created, became *ſui juris*, ii. 67. *n.* 2.
Knight-hood, who were compelled to receive, i. 404. *n.* 16.—ii. 69. *n.* 3.
Knight's ſervice, i. 410. *n.* 1, 2, 3.
——'s fee not limited in extent or value, ii. 62. *n.* 1.

L

Land, when deviſable, ii. 12. *n.* 4.
Landlord, has not a lien upon goods replevied, iii. 148. *n.* 1.
Land-tax, i. 312. *n.* 18, 19.; 313. *n.* 21.
————, not payable for a clear rent-charge, ii. 42. *n.* 26.
Lapſed benefice, who preſents to, upon the death of the biſhop, ii. 276. *n.* 3.
Larceny, when in ſtealing animals *feræ naturæ*, ii. 393. *n.* 1.
Larcenies, under pretence of hiring horſes or other contrivance, iv. 230. *n.* 1, 2.
Law, ſignification of the word, i. 39. *n.* 1.
——, municipal, definition of, i. 44. *n.* 5.
——, valid, though abſurd and unjuſt, i. 70. *n.* 3 and 4.
——, origin of the common, i. 74. *n.* 7.
——, of the road, i. 74. *n.* 7.
Laws, human, not ſuperſeded by the law of nature, i. 41. *n.* 3.
——, neceſſary in a ſtate of nature, i. 43. *n.* 4.
——, poſitive, binding in conſcience, i. 58. *n.* 7.
Leaſes in reverſion and poſſeſſion, ii. 319. *n.* 6.
———— college, ii. 322. *n.* 7.
——, clergymen's, when void by non-reſidence, ii. 322. *n.* 8, 9.

Lectures, seditious, iv. 88. *n.* 9.
Legacies, when vested, ii. 513. *n.* 17.
——— given over to a second legatee, when payable, ii. 513. *n.* 18.
——— given to all the children of A., how divided, *ib.*
——— and portions raised out of real property, ii. 513. *n.* 19.
Legacy, when recovered in an action, ii. 512. *n.* 16.
———, by a parent to a child carries interest immediately, ii. 514. *n.* 20.
Letters, stealing money out of, not capital, iv. 224. *n.* 5.
Lewdness, iv. 64. *n.* 12.
Lex mercatoria, i. 75. *n.* 8.
Libels, actions for, iii. 126. *n.* 6.
——, criminal prosecutions for, iv. 150. *n.* 5, 6.
Liberty, different kinds of, i. 126. *n.* 3.
Liens, ii. 453. *n.* 11.
Life estate, how forfeited by grant, ii. 171. *n.* 2.
——, tenant for, without impeachment, powers of, ii. 283. *n.* 13.
Lights, when antient, iii. 217. *n.* 1.
Limitation, words of, ii. 172. *n.* 3.
——— to actions, iii. 307. *n.* 6, 7, 8, 9, 10.
——— to ecclesiastical prosecutions, iii. 103. *n.* 4.
Literary property, ii. 407. *n.* 5, 6.
London, customs of, i. 76. *n.* 9.
Lords, trustees for the people, i. 213. *n.* 4.
Lotteries, iv. 168. *n.* 7.
Lunacy, plea of, ii. 292. *n.* 2.
Lunatics, i. 304. *n.* 16.
———, authority of justices over, iv. 25. *n.* 2.
———, how confined after trial, iv. 396. *n.* 2.

M

Magna charta, iv. 425. *n.* 3.
———, lord Coke's construction of, erroneous, iii. 41. *n.* 4.
Mail, robbery of, iv. 244. *n.* 15.
Malicious prosecution, action for, iii. 126. *n.* 7, 8.
Malt-tax, i. 313. *n.* 20.
Manslaughter, conviction of, at the admiralty sessions, iv. 269. *n.* 10.
———, punishment of, iv. 193. *n.* 3.
Manufacturers and tools, sending abroad, iv. 160. *n.* 8.
Marque, letters of, i. 259. *n.* 8.
Marriage, between whom prohibited, i. 435. *n.* 1, 2.
———, precontract of, void, i. 435. *n.* 3.
———, contract of, with a minor, valid, i. 456. *n.* 5.
———, when felony in the clergyman, i. 437. *n.* 6.
———, of an heiress under sixteen without consent, i. 437. *n.* 7. —iv. 209. *n.* 3.
———, act, i. 438. *n.* 8, 9, 11.
Marriages, early, why discontinued, ii. 131. *n.* 10.

Mayhem, remarkable property in the action of, iii. 121. *n.* 2.
———, under the Coventry act, iv. 207. *n.* 1.
Meſne profits, recoverable only for ſix years, iii. 205. *n.* 5.
Middleſex election, i. 163. *n.* 16.; 176. *n.* 43.
——— ſeſſions not diſcontinued by the ſittings of the king's bench. iv. 266. *n.* 7.
Militia, i. 412. *n.* 4, 5.
Miſchief by tame animals, when the owner is liable for, iii. 153. *n.* 2.
Miſdemeanours, what, iv. 5. *n.* 2.—221. *n.* 1.
Money bills, i. 170. *n.* 26.
—— to be laid out in land, how diſpoſed of, ii. 364. *n.* 6.
Month, when reckoned by the calendar, ii. 141. *n.* 1.
Months, ſix, different from half a year, *ib.*
Mortgage, when it may be redeemed, ii. 159. *n.* 1, 2.
Mortgagee, may diſtrain, ii. 159. *n.* 3.
———, with title deeds, when preferred, ii. 159. *n.* 4.
———, third, purchaſing the firſt mortgage preferred to the ſecond, ii. 159. *n.* 4.
———, heir and deviſee, when they ſhall have the eſtate exonerated of the mortgage out of the perſonal eſtate, ii. 512. *n.* 15.
Mortmain act, what caſes within, ii. 274. *n.* 1, 2.
Murder and manſlaughter, originally the ſame, i. 129. *n.* 7.
———, when by procuring an abortion, i. 130. *n.* 8.
———, cannot be committed by perjury, iv. 196. *n.* 5.
———, conviction of, upon an indictment for petit treaſon, iv. 204. *n.* 8.
———, by cruelty to apprentices, iv. 196. *n.* 6.

N

National debt, i. 327. *n.* 38.; 328. *n.* 40, 41, 42.
Ne exeat regno, i. 266. *n.* 10.
Negroes, freedom of, i. 127. *n.* 4.; 425. *n.* 1, 2.
Nobility, how tried, i. 401. *n.* 7.—iv. 348. *n.* 2.
Notice to quit, half a year, ii. 141. *n.* 1.; 147. *n.* 3.
———, when ſufficient, ii. 147. *n.* 3, 4, 5.
—— of trial of actions, iii. 357. *n.* 3, 4.
—— of miſdemeanours, iv. 351. *n.* 3.
—— to produce written evidence, iii. 382. *n.* 23.
Nolo epiſcopari, a vulgar error, i. 380. *n.* 8.
Nudum pactum, what in the civil law, ii. 445. *n.* 2.
Nuiſance, iii. 217. *n.* 2, 3.
Nullum tempus, i. 247. *n.* 3.

O

Oath cannot be adminiſtered by the houſe of commons, iv. 137. *n.* 5.
Oaths, illegal, adminiſtering, iv. 102. *n.* 4.
Office, vacated by the acceptance of another incompatible, ii. 37. *n.* 16.

Officers, half pay of, not assignable, i. 417. *n.* 8.
Options, i. 381. *n.* 11.
Ordinary, who, i. 383. *n.* 18.
Outlaws, when ousted of clergy, iv. 319. *n.* 1.

P

Papists, how far tolerated, iv. 58. *n.* 1.
Paraphernalia, ii. 436. *n.* 3.
Parcener, grantee of, may present alone to a benefice, ii. 189. *n.* 6.
Parceners, descent of honours and offices to, ii. 216. *n.* 8.
Parents and children, how far compelled to support each other, i. 448. *n.* 1, 2, 3. 5, 6.
Parish boundaries no evidence of the boundaries of a manor, i. 113. *n.* 19.
Parliament, origin and derivations of the word, i. 147. *n.* 1.
———, king's prerogative of giving a right to send members to, i. 97. *n.* 6.
———, a place not necessary to be incorporated to have the grant of sending members to, i. 114. *n.* 21.
———, fifty days between the teste and the return of the writ of summons, i. 150. *n.* 3.
———, number of the members, i. 155. *n.* 8.; 174. *n.* 34.
———, bishops' authority in, i. 156. *n.* 9.
———, omnipotence of, i. 161. *n.* 12.
———, minors incapable of sitting in, i. 162. *n.* 12.
———, the lord steward's oath to the members, i. 162. *n.* 14.
———, law of, to be construed like other laws, i. 163. *n.* 18.
———, privileges of, ought to be ascertained and defined, i. 164. *n.* 19.
———, privileges of, after a dissolution, i. 165, i. 165. *n.* 21.
———, privileges of, in the case of libels, i. 167. *n.* 22.
———, attorney-general, capable of sitting in, i. 168. *n.* 23.
———, proxies in, i. 168. *n.* 24.
———, how convened after adjournment or prorogation, i. 187. *n.* 64.
Parliaments, antient durations and intermissions of, i. 153. n. 6, 7.
Parsonages, how repaired, i. 392. *n.* 32.
Part-performance of a verbal contract, iii. 159. *n.* 4.
Partition generally made by a decree in equity, ii. 183. *n.* 2.; 189. *n.* 7.
Patents for a new discovery, ii. 407. *n.* 8.
Peerage by writ and patent, i. 398. *n.* 3.; 400. *n.* 5, 6.
Peeresses entitled to the privilege of peerage, iv. 367. *n.* 1.
Peers, protests of, i. 168. *n.* 25.
——, by whom tried, i. 401. *n.* 7.; iv. 348. *n.* 2.
——, give evidence upon oath, i. 402. *n.* 11.
Peine forte et dure, iv. 325. *n.* 3, 4.
Perjury in swearing to belief, iv. 138. *n.* 6.
Perpetuity, what, ii. 172. *n.* 3.

Perſonal property, though altered, may be ſeized by the owner if he can prove it's identity, ii. 404. *n.* 3.
———————, cannot be made to deſcend as heir looms, ii. 427. *n.* 1.
Petitioning creditor's debt, ii. 480. *n.* 15.; iii. 415. *n.* 2.
Petitions to the king or parliament, i. 143. *n.* 16.
——— of the commons, i. 182. *n.* 59.
Pew, right to, ii. 429. *n.* 3.
Phyſicians cannot maintain actions for fees, iii. 28. *n.* 3.
Pleading double not to penal ſtatutes, iii. 308. *n.* 11.
Pluralities, i. 392. *n.* 33, 34, 35.
Policies valued and open, ii. 461. *n.* 16.
Poor, overſeers of, i. 360. *n.* 23.
——, removal and ſettlements of, i. 362. *n.* 24, 25, 26, 27, 28, 29, 30, 31.
Population, when increaſed, ii. 205, *n.* 2.
Poſſeſſio fratris, where it cannot exiſt, ii. 228. *n.* 13.
Poſſeſſion of land for ſixty years, when a title, iii. 196. *n.* 1.
Poſſibility, covenant to convey a, ii. 290. *n.* 1.
Poſthumous children, rights of, i. 130. *n.* 9.—ii. 169. *n.* 1.
Poſt-office, i. 322. *n.* 28, 29, 30, 31.
Præmunire, iv. 118. *n.* 3.
Pregnancy, plea of, iv. 395. *n.* 1.
Preſſing of ſailors legal, i. 420. *n.* 11.
Prices, antient and modern, how compared, i. 277. *n.* 17.
Prince of Wales, i. 224. *n.* 7.
Princeſs royal, i. 224. *n.* 6.
Printing preſſes regiſtered, iv. 153. *n.* 7.
Prints, property in, ii. 407. *n.* 7.
Priſoner in irons during arraignment, iv. 322. *n.* 2.
Privately ſtealing, iv. 242. *n.* 9. 11.
Privy council, i. 230. *n.* 1, 2.; 232. *n.* 3, 4.
Proviſions, when granted, iii. 113. *n.* 6.
Promiſſory notes. See *Bills of Exchange.*
Property, origin of, ii. 8. *n.* 1, 2.
———, a natural and not a civil right, ii. 11. *n.* 3.—iv. 9. *n.* 4.
Prorogation, i. 187. *n.* 62.
Proteſt of bills of exchange when neceſſary, and effect of, ii. 241. *n.* 2.: 468. *n.* 21.
Per autre vie eſtates, ii. 259. *n.* 1, 2.
Purchaſe, uſed in contradiſtinction to deſcent, ii. 201. *n.* 1.
Purchaſer, to be of the blood of the firſt, explained, ii. 220. *n.* 9.

Q

Quakers' affirmation, iii. 369. *n.* 14.
Qualification to kill game, i. 60. *n.* 9.
——— of candidates, i. 180. *n.* 52.
Quarantine, iv. 161. *n.* 2.
Quo warranto informations, iii. 264. *n.* 1.

Quo warranto, a new trial in, though verdict for defendant, iv. 312. *n.* 4.
Queen regnant, prerogatives of, i. 218. *n.* 1.
—— may be tried as a subject, i. 222. *n.* 4.
—— Anne's bounty, i. 285. *n.* 4, 5.

R

Re-assurance, ii. 461. *n.* 16.
Receivers of stolen goods, iv. 133. *n.* 2.
Recoveries and fines, ii. 357. *n.* 3, 4, 5.
Reformation, i. 279. *n.* 23.
Registered deed, advantage of, ii. 343. *n.* 17.
Relations collateral, quadrupled in each generation, ii. 205. *n.* 3.
Rent, when payable to the heir, and when to the executor of lessor, ii. 43. *n.* 29.
——, lessee liable to pay rent, though the premises are burnt down. ii. 281. *n.* 11.
Residence, i. 392. *n.* 27, 28, 29, 30, 31.
Resignation of a benefice, whether the bishop bound to accept, i. 393. *n.* 39.
—— —— bonds void, ii. 280. *n.* 8.
Respondentia, ii. 458. *n.* 13.
Revenue, officers of, disqualified to vote, i. 174. *n.* 33.
—— acts, how construed, i. 324. *n.* 32.
——, amount of, i. 326. *n.* 37.; 327. *n.* 39.; 332. *n.* 44.
Revocation of a will by marriage and children, ii. 376. *n.* 4.
Rights of things not distinguished from rights of persons, i. 122. *n.* 1.
Riots, damages by, iv. 143. *n.* 1.
Roads, when passengers may turn out of, into the adjoining land, i. 36. *n.* 15.
Robbery, iv. 244. *n.* 12, 13.
Rutherforth's institutes of natural law recommended, i. 62. *n.* 10.

S

Sale, when fraudulent, ii. 441. *n.* 1.
Scandalum magnatum, iii. 124. *n.* 4.
Scotland, parliament and laws of, i. 95. *n.* 4.
——, union with, i. 96. *n.* 5, 6.
——, qualifications of the representatives of, i. 97. *n.* 6.
——, peerage of, i. 97. *n.* 7.
——, when bound by statutes, i. 98. *n.* 8.
Scrutiny, i. 180. *n.* 53.
Seamen, seducing, iv. 102. *n.* 4.
Seas, offences upon the high, how tried, iv. 269. *n.* 10.
Sedition, new act, iv. 88. *n.* 9.
Seditious societies suppressed, iv. 153. *n.* 7.
Seduction, action for, iii. 142. *n.* 14.

Septennial act not unconstitutional, i. 189. *n.* 65.
Servants tax, i. 326. *n.* 35.
———, authority of justices respecting, i. 426. *n.* 3.; 429. *n.* 9.
———, when masters answerable for, i. 430. *n.* 12. 13.
———, master cannot justify an assault in defence of, iii. 3. *n.* 1.
———, when guilty of felony, iv. 230. *n.* 3.
Service, action for loss of, i. 429. *n.* 10.—iii. 142. *n.* 13.
Session of parliament, i. 187. *n.* 63.
Sessions, what felonies are tried at, iv. 271. *n.* 10.
Settlements, marriage, how construed, ii. 172. *n.* 3.
Set-off, iii. 305. *n.* 5.
Sheriffs, i. 340. *n.* 1, 2, 3, 4, 5, 6, 7, 8.
——— may be elected to parliament out of their own county, i. 175. *n.* 38.
Ships, what, privileged, i. 419. *n.* 9, 10.
Shooting at another, iv. 208. *n.* 2.
Simony, what cases within the statute of, ii. 279. *n.* 5, 6, 7, 8.—iv. 62. *n.* 8.
———, when it may be given in evidence, ii. 280. *n.* 9.
Sinecures, i. 386. *n.* 19, 20.
Sittings in London and Middlesex, iii. 58. *n.* 7.
Slander, iii. 123. *n.* 3. 5.
Smugglers, peculiar mode of outlawing, iv. 155. *n.* 2.
Socage, derivation of, ii. 81. *n.* 1.
Soldiers, privileges of, i. 417. *n.* 7.; 421. *n.* 12.
———, seducing of, iv. 102. *n.* 4.
Speaker of the house of lords, i. 181. *n.* 55.
——— of the commons, when introduced, i. 181. *n.* 56.
———————————, his excuses to, and approbation by, the king, i. 181. *n.* 57.
Stamp-acts ought to be consolidated, i. 324. *n.* 33.
Star-chamber, a conjecture concerning the name of the, iv. 266. *n.* 8.
Statutes in pari materiâ, construction of, i. 60. *n.* 9.
——— commencement of their operation, i. 70. *n.* 4.
——— declaratory and introductory, i. 86. *n.* 15.
——— enlarging and restraining, i. 86. *n.* 16.
——— penal and remedial, i. 88. *n.* 18, 19.
——— penal, construed strictly; and remedial, liberally, i. 88. *n.* 19, 20.
——— contrary to reason, not void, i. 91. *n.* 21.
——— not in English till Ric. III. i. 181. *n.* 60.
Sterling money, i. 278. *n.* 19, 20, 21.
Steward, court of the high, iv. 263. *n.* 4.
Stolen goods, restitution of, iv. 363. *n.* 11.
Streams of water, right to, ii. 403. *n.* 1.
Strict settlement, ii. 172. *n.* 3.
Striking in the king's palace, iv. 125. *n.* 4.
Subsidies, i. 312. *n.* 17, 18.
Sunday, process upon, iii. 128. *n.* 9.

Sunday, profanation of, iv. 64. *n.* 9.
Surety may maintain assumpsit against the principal, iii. 162. *n.* 4.
Swearing, profane, iv. 60. *n.* 6.

T

Tales, when prayed, iii. 365. *n.* 8.
Taxes, expences of collecting, i. 318. *n.* 25.
Tender in bank notes, when sufficient, iii. 303. *n.* 4.
Tenures in capite, ii. 77. *n.* 8.
Terms, law, when they begin, iii. 278. *n.* 1.
Test and corporation acts, iv. 58. *n.* 2, 3, 4.
Thellusson's will, ii. 174. *n.* 4.
Threatening letters, iv. 144. *n.* 2.
Title for orders, i. 394. *n.* 40.
Tithes, personal, ii. 24. *n.* 4.
——, compositions for, ii. 29. *n.* 8.
——, modus for, when good, ii. 29. *n.* 9.
—— not paid by the king's tenant, ii. 31. *n.* 10.
——, what abbey lands free from, and how proved, ii. 32. *n.* 11, 12.
Township, what, i. 114. *n.* 20.
Trades, exercising without an apprenticeship, i. 428. *n.* 7.
Transportation, when introduced, i. 137. *n.* 14.
——————, returning from, iv. 132. *n.* 1.
Treason, iv. 79. *n.* 1, 2, 3, 4, 5, 6, 7.
——— in Scotland, iv. 84. *n.* 8.
———, copy of indictment and list of witnesses, iv. 351. *n.* 4.
———, forfeiture in, restored, iv. 385. *n.* 3.
———, new act, iv. 88. *n.* 9.
———, how tried, when the king's life is attempted, iv. 352. *n.* 6.
Trees cut by tenant in tail, after possibility of issue extinct, ii. 125. *n.* 3.
—— severed by accident or wrongfully, who entitled to, ii. 281. *n.* 12.
Trespass, actions of *vi et armis*, and upon the case, iii. 209. *n.* 1.
———, proceedings in trespass staid upon restoring the goods, iii. 304. *n.* 5.
Trial, court may adjourn in a criminal, iv. 360. *n.* 9.
——, new, when granted, iii. 387. *n.* 1.
Trusts, how created, and when executed by the statute, ii. 336. *n.* 11, 12.
—— merged in the legal estate, when they meet in the same person, ii. 337. *n.* 16.
Turnpikes, destroying of, iv. 144. *n.* 4.

U

Union with Ireland, i. 104. *n.* 15.
Universities, civil corporations, i. 471. *n.* 1.
Usury, ii. 458. *n.* 13.; 463. *n.* 19.—iv. 157. *n.* 4.

V

Vacancy in the house of commons during a recess, i. 174. *n.* 44.
Vagrants, iv. 165. *n.* 5, 6.; 169. *n.* 9.
Ventre inspiciendo, writ *de*, i. 456. *n.* 7.
Vicarages, i. 387. *n.* 22, 23. 26.
Vices, distinction between private and public, considered, i. 124. *n.* 2
Villenage, when extinct, ii. 96. *n.* 5.
Visitatorial authority, i. 482. *n.* 11, 12, 13, 14.
Votes at elections, how multiplied, i. 173. *n.* 3.
Vote, casting, i. 181. *n.* 58.

W

Wagers, iv. 173. *n.* 11.
Wages of members of parliament, i. 174. *n.* 34.
Walliæ statutum, i. 194. *n.* 2.
Wapentakes and hundreds, the same, i. 115. *n.* 22.
Wardships and marriages, productive sources of revenue, ii. 71. *n.* 5.
Waste and destruction, distinction between, ii. 283. *n.* 13.
Waste, iii. 223. *n.* 1, 2, 3.
Weights and measures, i. 276. *n.* 10.
———, false, statutes to prevent, iv. 157. *n.* 5.
Westminster, why a city, i. 114. *n.* 21.
Wife, selling, a misdemeanour, iv. 64. *n.* 12.
Will, revocation of, ii, 376. *n.* 3, 4.
——, execution of, ii. 377. *n.* 5, 6, 7, 8.
——, when after-purchased lands pass by a, ii. 378. *n.* 10.
——, repugnant clauses how construed, ii. 380. *n.* 12.
——, construed agreeably to testator's intention, ii. 381. *n.* 13, 14.
Window-tax, i. 325. *n.* 34.
Witchcraft, laws against, repealed, iv. 62. *n.* 7.
Witnesses, excommunicated, incompetent, iii. 102. *n.* 4.
Women not favoured by the English law, i. 445. *n.* 23.
——, judgment of, in treason, iv. 93. *n.* 13.; 204. *n.* 9.
Wool, exportation of, iv. 154. *n.* 1.
Wreck, why given to the king, i. 296. *n.* 8.
Writ of inquiry, when necessary, and how executed, iii. 398. *n.* 4.

THE END.

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